Frances Joycelyn Nathan & Ors v Siva Subramaniam a/l M Shanmugam (suing as the sole proprietor practicing in the name and style of Subramaniam & Shafiq, an advocate and solicitor's firm) and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-02(NCvC)(W)-2112–11 OF 2022 AND P-02(NCvC)(W)-2197–11 OF 2022

NANTHA BALAN, MOHD NAZLAN AND CHOO KAH SING JJCA

11 NOVEMBER 2024

Tort — Defamation — Libel — Insurer issued email to its staff and external solicitors to beware of lawyer's tendency to obtain liability and quantum judgments in default ('JID') against its unrepresented insured in accident cases — Impugned email gave external solicitors blanket authority to forthwith go on record as acting for the unrepresented insured to prevent JID from being entered — Whether impugned email was merely insurer's risk-management measure to prevent JID from being entered against its insured and was not defamatory of lawyer — Whether even if email was defamatory insurer was protected by defences of justification and qualified privilege

The first appellant ('A1') in Appeal 2112 was the senior claims manager — the second appellant ('A2') was her immediate superior — in the third appellant ('A3') insurance company. The respondent in that appeal ('Siva') was an advocate and solicitor who practised as a sole-proprietor of his own firm. On 15 December 2017, A1 composed and sent out an email (which A2 and A3 did not object to) to 21 of A3's employees (mainly claims examiners and clerks in the claims department) and six of A3's external solicitors in the Northern region of West Malaysia to inform them that Siva was 'assessing claims without the defendant lawyers appointed'. The email further stated that 'If you do come across such situations, please enquire with the court interpreter who are the insurers and go on record if Allianz are the insurers on record'. In effect, the impugned email alleged that Siva had, when acting for plaintiffs in road-accident cases against defendants insured by A3, served the court cause papers only on the insured without notice to A3 (which he was entitled to do under the Road Transport Act 1987 ('the RTA')) and taken judgments in default ('JID') with respect to liability and quantum whilst the insured remained unrepresented. A1-A3 contended that the impugned email was not intended to defame Siva but to comply with A3's Third Party Bodily Injury Manual 2017 ('TPBI Manual') as a risk-management measure to prevent the recurrence of events which had occurred in a magistrate's court running-down action ('the Georgetown Suit') in which Siva had acted for the third-party

plaintiff. The plaintiff's claim for damages was founded on an alleged collision between his motorcycle and A3's insured motorcycle. After notifying A3, as he was obliged to do under s 96(2) of the RTA, of the plaintiff's intention to file court proceedings, Siva had thereafter served all cause papers — relevantly, the writ, statement of claim and the subsequent notice for assessment of damages — only on A3's insured, who not only failed to inform A3 of the court proceedings but had failed to attend court as well. As a result, the plaintiff obtained JID in respect of both liability and quantum and sought to enforce the judgment against A3 including issuing a notice of winding up if the judgment debt was not paid. A3 successfully applied to set aside the JID, bolstered by the discovery of the fact that the plaintiff's claim was fraudulent as the rider of the insured motorcycle made a police report and a statutory declaration that the insured motorcycle was never involved in the accident. Siva, however, took the position that the impugned email was maliciously made to defame him after his client, the third-party claimant in another running-down action ('the Kulim Suit'), succeeded in recovering the judgment debt therein from A3 after A3 had instructed its solicitor not to defend the action on the mistaken belief that it had a declaratory order entitling it to avoid payment. Siva sued A1-A3 in the High Court for damages for defamation, alleging that the impugned email had damaged his reputation by suggesting that he was, inter alia, unethical, a cheat and a fraudster. After a full trial, the High Court allowed Siva's claim, rejected the defences of justification and qualified privilege and awarded Siva RM300,000 in damages plus interest and costs. In Appeal 2112, A1-A3 appealed against both liability and quantum. In Appeal 2197, Siva sought an increase in the award of damages arguing that he should have been awarded RM4.8m on the ground that the impugned email had caused one of his clients, Tokio Marine Insurance (M) Bhd ('Tokio Marine'), to stop giving him work.

Held, unanimously allowing Appeal 2112, dismissing Appeal 2197, setting aside the High Court's decision and dismissing Siva's claim:

(1) The impugned email was not defamatory of Siva and was not capable of conveying the defamatory imputations he had pleaded in his statement of claim and as elaborated in his witness statement (see para 161).

(2) Alternatively, even if the impugned email was defamatory, the words contained therein, '... the above lawyer is assessing claims without the defendant lawyers appointed ...' were true in substance. Hence, the defence of justification (per s 8 of the Defamation Act 1959) succeeded (see para 162).

(3) Further, even if the defence of justification failed, A1-A3 were entitled to succeed on the defence of qualified privilege as A1, in her capacity as senior claims manager, was under a duty to protect A3's commercial/legal interests by proactively taking risk-management steps to avert or avoid

A the situation that occurred in the Georgetown Suit and there was a reciprocal interest on the part of the panel solicitors and A3's claims examiners in being informed of Siva's tendency to go ahead with assessment of damages in the absence of solicitors who would ordinarily be appointed by A3. On the evidence, the privilege was not lost due to
B any malice on A1's part. The onus was on Siva to prove malice and not on A1-A3 to prove their bona fides or absence of malice (see paras 163–164).

(4) While it was Siva's theory that the impugned email was issued to revenge his threat to take execution proceedings, including winding-up action,
C against A3 in respect of the judgment obtained in the Kulim Suit, this court found no causal connection between the impugned email and the Kulim Suit. Instead, it was clear that the email was issued as part of A3's risk management action so that if A3's panel lawyers saw Siva going ahead with assessment of damages without the other side being represented,
D they were to check if it involved A3's insured. This was particularly necessary because Siva, to put it in the context of para 4.1 of the TPBI Manual, had the tendency to serve (cause papers) directly on the insured. Hence, the impugned email was in line with A3's instructions to its panel lawyers to protect its interests (see paras 124, 131, 160 & 164).

E (5) This court did not agree with the High Court's interpretation that the impugned email and the checks that it called upon A3's panel lawyers to do suggested that Siva must have committed some misconduct. On the contrary, the words in the impugned email merely conveyed the impression that Siva was someone who had the tendency to serve cause
F papers only on the insured and to proceed to assess damages without notifying the insurer, which was exactly what happened in the Georgetown Suit and which was totally envisaged by para 4.1 of A3's TPBI Manual (see paras 136–137 & 145).

G (6) By checking and taking steps to go on record for and on behalf of A3 (if the case involved A3's insured vehicle), all that the panel solicitors were doing, pursuant to the impugned email, was to ensure that A3's rights and interests were protected. Such actions by the solicitors, as the 'eyes and ears' of A3, were indeed proactive risk-management steps to ensure
H that A3 was not financially or reputationally prejudiced by the absence of solicitors representing its insured. The panel solicitors concerned would intervene and try to go on record on behalf of A3's insured, not because Siva was committing misconduct or acting contrary to the provisions of the RTA or the Rules of Court 2012, but because of his tendency to go
I ahead with assessment of damages without informing A3 that JID had been entered against its insured (see paras 147 & 153).

(7) Siva failed to prove his claim for loss of income amounting to RM4.8m as there was no credible evidence that Tokio Marine had stopped giving him work because of the impugned email. No one from Tokio Marine

testified at the trial and there was no evidence that Tokio Marine was even aware of the impugned email. This part of Siva's claim was rightly rejected by the High Court as being unproven and remote (see paras 15 & 170).

(8) Since the insurer was the ultimate paymaster under s 96(1) of the RTA of any judgment that was obtained by a third-party claimant against its insured, it was imperative that insurers should have conduct of the running-down action right from the beginning. However, nothing in s 96(1) of the RTA made it mandatory for the third-party to serve the writ and other cause papers (including notice of assessment of damages) on the insurer. If the insured, on whom the cause papers were served, failed to notify the insurer of that fact as well as to attend court, judgment in default would usually be the result. The invidious and disadvantageous position that insurers found themselves in should be rectified by Parliament amending s 96 of the RTA to make the insurer's liability to pay on the judgment conditional upon proof of service of the writ and statement of claim on the insurer. And, the Rules of Court 2012 should also be amended to provide that no judgment in default (whether on liability or quantum) against the insured should be given unless there was evidence to show that the insured had been served with the relevant cause papers (see paras 36–39).

[Bahasa Malaysia summary

Perayu pertama ('A1') dalam Rayuan 2112 adalah pengurus kanan tuntutan — perayu kedua ('A2') adalah ketuanya — dalam syarikat insurans perayu ketiga ('A3'). Responden dalam rayuan itu ('Siva') adalah seorang peguambela dan peguamcara yang beramal sebagai pemilik tunggal firmanya sendiri. Pada 15 Disember 2017, A1 telah mengarang dan menghantar emel (yang tidak dibantah oleh A2 dan A3) kepada 21 pekerja A3 (terutamanya pemeriksa tuntutan dan kerani di bahagian tuntutan) dan enam peguamcara luar A3 di bahagian Utara Malaysia Barat untuk memaklumkan mereka bahawa Siva sedang 'menilai tuntutan tanpa peguamcara defendan dilantik'. Emel itu selanjutnya menyatakan bahawa 'Jika anda berdepan situasi sedemikian, sila tanya jurubahasa mahkamah yang merupakan penanggung insurans dan pemegang rekod jika Allianz adalah penanggung insurans dalam rekod'. Sebenarnya, emel yang disangkal itu mendakwa bahawa Siva telah, semasa bertindak untuk plaintif dalam kes kemalangan jalan raya terhadap defendan yang diinsuranskan oleh A3, menyerahkan kertas kausa mahkamah hanya kepada yang diinsuranskan tanpa notis kepada A3 (yang dia berhak lakukan di bawah Akta Pengangkutan Jalan 1987 ('APJ')) dan mengambil penghakiman ingkar ('PI') berkenaan dengan liabiliti dan kuantum manakala yang diinsuranskan kekal tidak diwakili. A1-A3 berpendapat bahawa emel yang disangkal itu bukan bertujuan untuk memfitnah Siva tetapi untuk mematuhi Third Party Bodily Injury Manual 2017 A3 ('Manual TPBI') sebagai langkah pengurusan risiko untuk mengelakkan berulangnya peristiwa yang telah

berlaku dalam tindakan kemalangan mahkamah majistret ('Saman Georgetown') yang mana Siva bertindak bagi plaintif pihak ketiga. Tuntutan plaintif untuk ganti rugi berasaskan dakwaan perlanggaran antara motosikalnya dan motosikal yang diinsuranskan A3. Selepas memaklumkan A3, kerana dia diwajibkan untuk melakukannya di bawah s 96(2) APJ, tentang hasrat plaintif untuk memfailkan prosiding mahkamah, Siva selepas itu telah menyampaikan semua kertas kausa — yang berkaitan, writ, pernyataan tuntutan dan notis lanjutan untuk taksiran ganti rugi — hanya pada orang yang diinsuranskan A3, yang bukan sahaja gagal untuk menghadiri prosiding mahkamah tetapi juga gagal untuk memaklumkan kepada A3. Akibatnya, plaintif memperoleh JID berkenaan dengan liabiliti dan kuantum dan memohon untuk menguatkuasakan penghakiman terhadap A3 termasuk mengeluarkan notis penggulungan jika hutang penghakiman tidak dibayar. A3 berjaya memohon untuk mengetepikan PI, disokong oleh dapatan fakta bahawa tuntutan plaintif adalah satu penipuan kerana penunggang motosikal yang diinsuranskan membuat laporan polis dan akuan berkanun bahawa motosikal yang diinsuranskan tidak pernah terlibat dalam kemalangan itu. Siva, bagaimanapun, mengambil pendirian bahawa emel yang disangkal itu dibuat secara berniat jahat untuk memfitnahnya selepas anakguamnya, penuntut pihak ketiga dalam satu lagi tindakan kemalangan ('Saman Kulim'), berjaya mendapatkan semula hutang penghakiman di dalamnya daripada A3 selepas A3 telah mengarahkan peguamcaranya untuk tidak mempertahankan tindakan itu atas tersilap percaya bahawa ia mempunyai perintah deklarasi yang melayakkannya mengelakkan pembayaran. Siva menyaman A1-A3 di Mahkamah Tinggi untuk ganti rugi kerana fitnah, mendakwa bahawa emel yang disangkal itu telah merosakkan reputasinya dengan mencadangkan bahawa dia, antara lain, tidak beretika, licik dan penipu. Selepas perbicaraan penuh, Mahkamah Tinggi membenarkan tuntutan Siva, menolak pembelaan justifikasi dan perlindungan bersyarat dan menganugerahkan Siva RM300,000 sebagai ganti rugi serta faedah dan kos. Dalam Rayuan 2112, A1-A3 merayu terhadap liabiliti dan kuantum. Dalam Rayuan 2197, Siva memohon kenaikan dalam pemberian ganti rugi dengan alasan bahawa dia sepatutnya diberikan RM4.8 juta atas alasan bahawa emel yang disangkal itu telah menyebabkan salah seorang pelanggannya, Tokio Marine Insurance (M) Bhd ('Tokio Marine'), berhenti memberinya kerja.

Diputuskan, sebulat suara membenarkan Rayuan 2112, menolak Rayuan 2197, mengetepikan keputusan Mahkamah Tinggi dan menolak tuntutan Siva:

(1) Emel yang disangkal itu tidak memfitnah Siva dan tidak mampu untuk menyampaikan tuduhan fitnah yang telah diplidkannya dalam penyataan tuntutan dan seperti yang dihuraikan dalam kenyataan saksinya (lihat perenggan 161).

(2) Sebagai alternatif, sekiranya emel yang disangkal itu berunsur fitnah,

perkataan yang terkandung di dalamnya, '... peguam di atas sedang menilai tuntutan tanpa peguam defendan dilantik ...' adalah benar pada hakikatnya. Oleh itu, pembelaan justifikasi (per s 8 Akta Fitnah 1959) berjaya (lihat perenggan 162).

(3) Tambahan pula, walaupun pembelaan justifikasi gagal, A1-A3 berhak untuk berjaya mempertahankan perlindungan bersyarat kerana A1, dalam kapasitinya sebagai pengurus tuntutan kanan, berada di bawah kewajipan untuk melindungi kepentingan komersial/undang-undang A3 dengan mengambil langkah pengurusan risiko secara proaktif untuk menolak atau mengelakkan situasi yang berlaku di pihak Georgetown Suit dan terdapat kepentingan timbal-balik panel peguamcara dan pemeriksa tuntutan A3 dimaklumkan tentang kecenderungan Siva untuk meneruskan penilaian ganti rugi sekiranya tiada peguamcara yang biasanya dilantik oleh A3. Berdasarkan keterangan, perlindingan itu tidak hilang kerana sebarang niat jahat di pihak A1. Tanggungjawab adalah pada Siva untuk membuktikan niat jahat dan bukan pada A1-A3 untuk membuktikan bona fide atau ketiadaan niat jahat mereka (lihat perenggan 163–164).

(4) Walaupun ia adalah teori Siva bahawa emel yang disangkal itu dikeluarkan untuk membalas dendam ugutannya untuk meneruskan prosiding pelaksanaan, termasuk tindakan penggulungan, terhadap A3 berkenaan dengan penghakiman yang diperolehi dalam Saman Kulim, Mahkamah ini mendapati tiada hubungan sebab akibat antara emel yang disangkal dan Saman Kulim. Sebaliknya, ia adalah jelas bahawa emel itu dikeluarkan sebagai sebahagian daripada tindakan pengurusan risiko A3 supaya jika peguam panel A3 melihat Siva meneruskan penilaian ganti rugi tanpa pihak lain diwakili, mereka perlu menyemak sama ada ia melibatkan pihak yang diinsuranskan A3. Ini amat perlu kerana Siva, untuk meletakkannya dalam konteks perenggan 4.1 Manual TPBI, mempunyai kecenderungan untuk menyampaikan (kertas kausa) secara langsung kepada pihak yang diinsuranskan. Oleh itu, emel yang disangkal itu adalah selaras dengan arahan A3 kepada peguam panelnya untuk melindungi kepentingannya (lihat perenggan 124, 131, 160 & 164).

(5) Mahkamah ini tidak bersetuju dengan tafsiran Mahkamah Tinggi bahawa emel yang disangkal dan semakan yang dipanggil peguam panel A3 untuk dilakukan mencadangkan bahawa Siva mesti melakukan beberapa salah laku. Sebaliknya, kata-kata dalam emel yang disangkal itu semata-mata menyampaikan tanggapan bahawa Siva adalah seseorang yang mempunyai kecenderungan untuk menyampaikan kertas kausa hanya kepada pihak yang diinsuranskan dan meneruskan untuk menilai ganti rugi tanpa memberitahu penanggung insurans, yang betul-betul berlaku dalam Saman Georgetown dan sepertimana perenggan 4.1

Manual TPBI A3 (lihat perenggan 136–137 & 145).

(6) Dengan menyemak dan mengambil langkah untuk membuat rekod untuk dan bagi pihak A3 (jika kes itu melibatkan kenderaan yang diinsuranskan A3), semua yang dilakukan oleh peguamcara panel, menurut emel yang disangkal, adalah untuk memastikan bahawa hak dan kepentingan A3 dilindungi. Tindakan sedemikian oleh peguamcara, sebagai 'mata dan telinga' A3, sememangnya merupakan langkah pengurusan risiko yang proaktif untuk memastikan bahawa A3 tidak prejudis dari segi kewangan atau reputasi dengan ketiadaan peguamcara yang mewakili pihak yang diinsuranskan. Peguamcara panel berkenaan akan campur tangan dan cuba membuat rekod bagi pihak yang diinsuranskan A3, bukan kerana Siva melakukan salah laku atau bertindak bertentangan dengan peruntukan RTA atau Kaedah-Kaedah Mahkamah 2012, tetapi kerana kecenderungannya untuk meneruskan taksiran ganti rugi tanpa memaklumkan A3 bahawa JID telah dimasukkan terhadap yg diinsuranskan (lihat perenggan 147 & 153).

(7) Siva gagal membuktikan tuntutannya untuk kehilangan pendapatan berjumlah RM4.8 juta kerana tiada keterangan yang boleh dipercayai bahawa Tokio Marine telah berhenti memberinya kerja kerana emel yang disangkal itu. Tiada seorang pun dari Tokio Marine memberi keterangan pada perbicaraan itu dan tiada keterangan bahawa Tokio Marine menyedari emel yang disangkal itu. Bahagian tuntutan Siva ini telah ditolak oleh Mahkamah Tinggi sebagai tidak terbukti dan terpencil (lihat perenggan 15 &170).

(8) Memandangkan penanggung insurans adalah pembayar muktamad di bawah s 96(1) APJ bagi mana-mana penghakiman yang diperoleh oleh pihak ketiga yang menuntut terhadap pihak yang diinsuranskan, ia adalah mustahak bahawa penanggung insurans harus menjalankan tindakan kemalangan itu dari awal. Walau bagaimanapun, tiada dalam s 96(1) APJ mewajibkan pihak ketiga menyerahkan writ dan kertas kausa lain (termasuk notis taksiran ganti rugi) kepada syarikat insurans. Sekiranya pihak yang diinsuranskan, yang telah menyerahkan kertas kausa, gagal untuk memberitahu syarikat insurans tentang fakta itu serta menghadiri mahkamah, penghakiman ingkar biasanya akan menjadi keputusannya. Kedudukan yang merugikan yang dihadapi oleh penanggung insurans harus diperbetulkan oleh Parlimen dengan meminda s 96 APJ untuk menjadikan liabiliti penanggung insurans untuk membayar pada penghakiman bersyarat dengan bukti penyerahan writ dan penyata tuntutan ke atas penanggung insurans. Dan, Kaedah-Kaedah Mahkamah 2012 juga harus dipinda untuk memperuntukkan bahawa tiada penghakiman ingkar (sama ada atas liabiliti atau kuantum) terhadap yang diinsuranskan harus diberikan melainkan terdapat keterangan yang menunjukkan bahawa yang

diinsuranskan telah diserahkan dengan kertas kausa yang berkaitan (lihat perenggan 36–39).] A

Cases referred to

Ahmad Nadzrin bin Abd Halim & Anor v Allianz General Insurance Co (M) Bhd [2015] 6 MLJ 223; [2015] 9 CLJ 821, CA (refd) B

Allied Physics Sdn Bhd v Ketua Audit Negara (Malaysia) & Anor and other appeals [2016] 5 MLJ 113, CA (folld)

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Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya'kub [2005] 3 MLJ 485; [2005] 2 CLJ 645, CA (refd) C

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)

Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 4 MLJ 242, CA (refd) D

Dato' Saizo Abdul Ghani v Celcom (M) Bhd & Anor [2008] 2 MLJ 931; [2008] 10 CLJ 169, HC (refd)

Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor [2021] 2 MLJ 577; [2021] 4 CLJ 327, FC (refd)

Dr Chong Eng Leong v Tan Sri Harris bin Mohd Salleh [2017] 4 MLJ 611, CA (refd) E

Hoe Thean Sun & Anor v Lim Tee Keng [1999] 3 MLJ 138, HC (refd)

Horrocks v Lowe [1975] AC 135, HL (refd)

Jiwaneswary a/p Raman v Etiqa General Takaful Bhd [2023] 2 MLJ 437; [2023] CLJU 93; [2023] 1 LNS 93, CA (refd) F

Mkini Dotcom Sdn Bhd & Ors v Raub Australian Gold Mining Sdn Bhd [2021] 5 MLJ 79, FC (refd)

Mohammad Hafizi bin Bahari & Anor v Pacific & Orient Insurance Co Bhd & Anor and another appeal [2024] 4 MLJ 223, CA (refd)

Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi (seorang tak berupaya dan dalam kecacatan/koma mendakwa melalui sahabat wakil dan ibu bapa yang sah Hamsudi bin Nin'ada dan Suneya bt Asbam) & Ors [2016] MLJU 1317; [2017] 4 CLJ 572; [2017] 2 MLRA 659, CA (refd) G

Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria Demadu [2021] 1 MLJ 303, CA (refd) H

Raja Syahrir bin Abu Bakar & Anor v Manjeet Singh Dhillon and other appeals [2020] 3 MLJ 482; [2019] 4 CLJ 301, CA (refd)

Siva Subramaniam a/l M Shanmugam (menyaman sebagai seorang pemilik tunggal yang beramal di bawah nama dan gaya Subramaniam & Shafiq, sebuah firma peguambela & peguamcara) v Frances Joycelyn Nathan & Ors [2022] MLJU 3001; [2022] AMEJ 1581, HC (refd) I

Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee [2015] 6 MLJ 187; [2015] 8 CLJ 477, FC (refd)

Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2

MLJ 56; [1973] CLJU 146; [1973] 1 LNS 146 (refd)
Tang Loon Pau & Ors v Mohd Salihin bin Kotni & Anor [2023] MLJU 1619; [2023] 8 CLJ 105, CA (refd)

Legislation referred to

Defamation Act 1957 s 8
Evidence Act 1950 s 101
Financial Services Act 2013
Road Transport Act 1987 s 96, 96(1), (2), (2)(a), (3)
Rules of Court 2012 O 13 r 2

Appeal from: *Siva Subramaniam a/l M Shanmugam (menyaman sebagai seorang pemilik tunggal yang beramal di bawah nama dan gaya Subramaniam & Shafiq, sebuah firma peguambela & peguamcara) v Frances Joycelyn Nathan & Ors* [2022] MLJU 3001 (High Court, Pulau Pinang)

Terence Chan Kah Meng (with Yeap Xi Jin) (Lim Kian Leong & Co) in Civil Appeal No P-02(NCvC)(W)-2112–11 of 2022 for the appellants.
Siva Subramaniam a/l M Shanmugam (Subramaniam & Shafiq) in Civil Appeal No P-02(NCvC)(W)-2197–11 of 2022 for the appellants.
Terence Chan Kah Meng (with Yeap Xi Jin) (Lim Kian Leong & Co) in Civil Appeal No P-02(NCvC)(W)-2197–11 of 2022 for the respondents.
Siva Subramaniam a/l M Shanmugam (Subramaniam & Shafiq) in Civil Appeal No P-02(NCvC)(W)-2112–11 of 2022 for the respondent.

Nantha Balan JCA:

INTRODUCTION

[1] There are two inter-related appeals before us, namely, Civil Appeal No P-02(NCvC)(W)-2112–11 of 2022 ('Appeal 2112') and Civil Appeal No P-02(NCvC)(W)-2197–11 of 2022 ('Appeal 2197'). The appeals arise from the decision of the learned judicial commissioner ('JC') of the High Court at Penang dated 27 October 2022 ('the said decision') delivered after full trial in Suit No PA-23NCVC-11–02 of 2018. We shall refer to this suit as the 'defamation suit'.

[2] Although these appeals arise from a defamation suit, it was necessary for us to make copious reference to two running down actions namely, Georgetown Magistrate Suit No PA-A73KJ-513–06 of 2017 ('Georgetown Suit') and Kulim Sessions Court Suit No A53KJ-126–07 of 2017 ('Kulim Suit') which are inextricably connected to the filing of the defamation suit. The Kulim Suit was originally filed as Mahkamah Majistret Bandar Bahru Saman No A73KJ-39–09 of 2015. By an order of the Kulim Sessions Court dated 12 July 2016, the case was transferred to the Kulim Sessions Court and

registered as Suit No A53KJ-126–07 of 2017.

[3] The common thread in the Georgetown Suit and in the Kulim Suit is that the plaintiff acted for the third-party claimant in both these running-down actions. And in both suits, the motor-vehicles which were allegedly involved in the motor-vehicular accidents which gave rise to the filing of the Georgetown Suit and the Kulim Suit, were insured by the third defendant. Thus, this judgment refers to the background facts for both these running-down actions in some detail to give context to the legal issues arising therefrom. Consequently, we were compelled to make some general observations about the law and practice of running-down actions and the motor insurer's statutory liability to pay when judgment is entered against their insured.

[4] The first defendant and second defendant are employees of the third defendant. The defamation suit is predicated on an email dated 15 December 2017 ('the impugned email') which was authored by the first defendant and tacitly condoned (or at any rate, not objected to) by her superior, the second defendant. According to the plaintiff, the third defendant, qua employer of the first defendant and defendant, is vicariously liable for their actions vis a vis the impugned email. The impugned email, which was published internally to employees of the third defendant and also to a few of their panel solicitors who regularly handled insurance (running down) cases, reads as:

> Subject: Subramaniam Shafiq
>
> It has come to our attention that *the above lawyer is assessing claims without the defendant lawyers appointed*. If you do come across such situations, please enquire with the court interpreter who are the insurers and to go on record if Allianz are the insurers on record.
>
> We require your help in the above. (Emphasis added.)

[5] At its core, the impugned email alleges that the plaintiff is conducting assessment of damages without the presence of the lawyers who would ordinarily have been appointed by the insurers to act for and on behalf of their insured (defendants).

[6] The plaintiff claimed that the impugned email conveyed defamatory imputations and the defamatory meanings are as stated in paras [86] and [87] of this judgment. As such, the plaintiff claims that his reputation as a senior advocate and solicitor had been irreparably tarnished.

THE HIGH COURT ORDER

[7] After a full trial, the JC found the impugned email to be defamatory of the plaintiff and rejected the defences of justification and qualified privilege.

Thus, the JC allowed the plaintiff's claim and ordered the defendants to pay RM300,000 as general damages (including aggravated and exemplary damages) with interest at 5%pa from the date of filing of the writ until full settlement, and an injunction restraining the defendants (or their agents) from repeating or publishing the said libellous statements of and concerning the plaintiff or words of like or similar effect. The High Court also awarded costs of RM50,000. The decision of the High Court is reported as *Siva Subramaniam a/l M Shanmugam (menyaman sebagai seorang pemilik tunggal yang beramal di bawah nama dan gaya Subramaniam & Shafiq, sebuah firma peguambela & peguamcara) v Frances Joycelyn Nathan & Ors* [2022] MLJU 3001; [2022] AMEJ 1581 (HC).

[8] Pursuant to the High Court's order, a sum of RM52,000 was paid to the plaintiff as costs. Thereafter, pursuant to a separate order of the High Court dated 24 November 2022, a sum of RM371,424.66 (as damages — with interest) was paid to the plaintiff. This sum was held by the plaintiff in an interest — bearing account pending the outcome of the present appeals.

APPEAL 2197

[9] The plaintiff is aggrieved that the JC had only awarded damages in the sum of RM300,000. As such, in Appeal 2197, the plaintiff is appealing against the inadequacy of the damages. According to the plaintiff, he should have been awarded a sum of RM4.8m as damages calculated on the basis of loss of income at the rate of RM20,000 per month.

[10] The plaintiff alleges that, as a result of the publication of the impugned email, he lost his income stream by way of regular insurance work from Tokio Marine Insurance (M) Bhd ('Tokio Marine') which is said to have generated an income of RM20,000 per month from this particular client.

APPEAL 2112

[11] In Appeal 2112 the defendants are appealing against the JC's finding of liability that they had defamed the plaintiff and in rejecting the defences of justification and qualified privilege. The defendants have also appealed against the quantum of damages. But the defendants' main focus in Appeal 2112 is that the impugned email was not defamatory of the plaintiff, and that in any event, the defence of justification and qualified privilege should succeed, thereby exonerating them from any liability.

PARTIES

[12] For convenience, we shall refer to the parties by their titles in the High Court. Hence, the respondent in Appeal 2112 (appellant in Appeal 2197) will be referred to as 'plaintiff', the appellants in Appeal 2112 (respondents in Appeal 2197) as first defendant ('D1'), second defendant ('D2') and third defendant ('D3') respectively. Where necessary, D1, D2 and D3 shall be referred to collectively, as 'the defendants'.

[13] The plaintiff is Mr Siva Subramaniam a/l M Shanmugam, an advocate and solicitor. He sued as the sole proprietor of a legal firm in the name and style of Subramaniam & Shafiq. The plaintiff was/is an active litigation lawyer. His litigation portfolio was mostly running-down (accident) claims where he would act for third-party claimants (plaintiffs).

[14] But there have been occasions, when he has, on instructions by the insurers, also acted for the insured motor vehicle owner, or driver/rider (defendants). In fact, in the past he had even acted for D3 in running-down matters. But D3 had stopped giving him work. It is unclear why D3 stopped engaging the plaintiff to handle running down matters for them. But that is irrelevant in this case. In so far as Tokio Marine is concerned, it is not in dispute that at all material times, the plaintiff handled cases for this particular insurer.

[15] However, the plaintiff claimed that he lost insurance work from Tokio Marine due to the publication of the impugned email. Perhaps it should be mentioned here that no one from Tokio Marine testified at the trial. There was in fact no evidence that Tokio Marine was even aware of the impugned email. This part of the plaintiff's claim was rejected by the JC as being unproven and remote. The plaintiff also claimed that he handled arbitration work. But it is quite apparent that in the main, the plaintiff's substantial litigation work was in handling running-down cases and that too, mostly for claimants.

[16] The defendants in the defamation suit are:

(a) Frances Joycelyn Nathan (D1);

(b) Jayapragash Amblavanar (D2); and

(c) Allianz General Insurance Co (M) Bhd (Company No: 735426-V) (D3).

[17] D3 is a licensed insurance company incorporated under the Financial Services Act 2013. D1 was the Senior Claims Manager at the Claims Department in D3. Her responsibilities included processing and settling claims arising from both motor and non-motor insurance policies. D2 was the

Head of the Claims Division (later he was D3's Senior Sales Consultant). D1 directly reported to D2 when he was the Head of the Claims Division.

[18] D3's standard operating procedure and risk management steps for motor claims-bodily injury and death (dependency) claims arising out of motor-vehicular accidents involving D3's insured vehicles is contained in a document called the Third Party Bodily Injury Manual 2017 ('TPBI Manual').

PUBLICATION OF THE IMPUGNED EMAIL

[19] The impugned email was copied to D2 (and D2's secretary — Nor Azua Omar), and 26 others, including D3's own staff (claims examiners) and six of D3's panel of external solicitors in the Northern region of West Malaysia (see: para 8 of the statement of claim). Although the impugned email was sent to employees of D3 and to external lawyers, it is quite clear from the tone of his answers in his witness statement and the way questions were put to the defendants' witnesses, who were the lawyers who received the impugned email, that the plaintiff was particularly concerned that his reputation amongst the legal fraternity had been tarnished. We turn now to the list of recipients of the impugned email. The recipients are as stated in the following table:

(*the remainder of this page is intentionally left blank*)

No	Name of Recipients	Designation	Recipient's e-mail address
1	Carol Teen May San	Claims Examiner	All emails redacted
2	Christy@Marcella Joseph	Claims Examiner	
3	Damian Marks Williams	Head of Non Motor Claims	
4	Darsheni Kumaragurubaran	Claims Examiner	
5	Jayapragash Amblavanar	Head Motor Claims	
6	Khanchna Pothuraj	Claims Examiner	
7	Livashini Mani Molley	Claims Examiner	
8	Lynette Lee Lyn Leq	Claims Examiner	
9	Malkeet Kaur Sarjit Singh	Claims Examiner	
10	Menaga Manavala Gurusamy	Claims Examiner	
11	Mona Shewandas	Claims Examiner	
12	Natalina Soba Gabriel	Claims Examiner	
13	Nor Azua Omar	Personal Assistant	
14	Nur Afiqah Azlan	Claims Examiner	
(15)	Nur Arina Mohd Ramlan	Senior Clerk	
(16)	Nur Shaheera Samsudin	Clerk	
(17)	Nurul Hana Usof	Senior Clerk	
(18)	Shalini Jyanaskeran	Claims Examiner	
(19)	Shamini Deventhiran	Claims Examiner	
(20)	Sufaizah Abd Shukor	Claims Examiner	
(21)	Yap Kah May	Claims Examiner	
(22)	Suresh Andrew	Panel Solicitor	
(23)	Suresh G.Sreedharan	Panel Solicitor	
(24)	Zamri Ali Hassan	Panel Solicitor	
(25)	Kantavil Karapiah	Panel Solicitor	
(26)	Anita Kaur	Panel Solicitor	
(27)	Lim Wen Jack	Panel Solicitor	

[20] It is not in dispute that, other than D2 (Jaya Pragash), and his personal assistant (Nor Azua Omar), the first to 21st recipients are examiners or clerical staff of D3. In that sense, the impugned email was internally circulated to D3's own staff. The significance of the internal circulation of the impugned email to D3's own staff is relevant to the defence of qualified privilege which we will

allude to in the later part of this judgment.

D3'S PANEL LAWYERS WHO RECEIVED THE IMPUGNED EMAIL

[21] The six panel lawyers who received the impugned email are Suresh Andrew, Suresh G Sreedharan, Zamri Ali Hassan ('Zamri'), Kantavil Karapiah, Anita Kaur ('Anita') and Lim Wen Jack ('Lim'). At the trial, Zamri, Anita and Lim testified on behalf the defendants. Zamri was attached to the law firm of Messrs Othman Hashim & Co ('OHC'), whilst Anita and Lim were from Messrs Zaid Ibrahim & Co ('ZICO'). Anita and Lim testified as DW2 and DW3 respectively. Zamri testified as DW6.

[22] Anita and Lim were both involved in the application by D3 to set aside a judgment in default that was obtained by the plaintiff via the Georgetown Suit whereas Zamri was involved in the Kulim Suit wherein his firm OHC were on record for the insured.

[23] The Kulim Suit was fixed for trial on 2 October 2017. Zamri was present when the matter came up for trial on 2 October 2017. He informed the sessions court that he had been instructed to discharge the firm of OHC as solicitors for the insured. OHC attempted to discharge themselves as solicitors for the insured as they had already obtained a declaratory order under s 96(3) of the Road Transport Act 1987 ('the RTA') by which it was declared that the relevant motor vehicle policy was null and void and that D3 are not liable for any judgment that was ordered against the insured in the Kulim Suit.

[24] Zamri's oral application for OHC to be discharged was refused and he was asked to file a formal application, which he later did, and the discharge of OHC was eventually granted on 16 October 2017. Thus, on 2 October 2017, the plaintiff proceeded with the trial, without Zamri's participation as he (Zamri) had decided not to participate in the trial for reasons which will become apparent in the later part of this judgment when we deal with the Kulim Suit and the events that took place before and after the said legal action. The post-trial decision of the Kulim Suit was given on 1 November 2017 wherein the session court found in favour of the plaintiff's client in the running down action and ordered judgment against D3's insured in the sum of RM512,699.16 (excluding interest and costs of RM44,520).

INSURER'S STATUTORY LIABILITY — S 96 OF THE ROAD TRANSPORT ACT 1987

[25] In the ordinary course of events, when there is a motor vehicle accident involving the insured motor vehicle, the third party's solicitors will serve the statutory notice under s 96(2) of the RTA on the insurer. A failure to serve the

notice under s 96(2) of the RTA would render an insurer immune from any statutory obligation to pay the judgment sum, in the event, judgment is taken against the insured. Thus, it would be a wasted exercise if the insured turns out to be impecunious. Hence, the need to serve the notice under s 96(2) of the RTA. Thereafter, when the running-down suit is filed (*where only the insured and the driver/rider sans the insurer are named as defendants*), the cause papers will usually (*but not always*) be served on the insurer who will then take conduct and defend the suit accordingly.

[26] And when judgment is obtained by a third party against the insured, pursuant to s 96(1) of the RTA, the insurer will be liable to pay to the third party being the person entitled to the benefit of the judgement any sum payable thereunder in respect of the said liability. Section 96(1) of the RTA is reproduced hereinbelow:

> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

[27] To recap, the insurer's liability is triggered when judgment is obtained against the insured, but only if that the notice under s 96(2) of the RTA be given to the insurer. In some cases, that is the only notice they will get. Section 96(2) of the RTA reads as follows:

> (2) No sum shall be payable by an insurer under subsection (1) —
>
> (a) in respect of any judgement, unless before or within seven days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the proceedings.

[28] Thus, since the insurer is the ultimate paymaster of the judgment that may be granted against their insured, it is imperative for the insurer to have total carriage of the defence in the running down suit. However, as a matter of civil procedure, they are not named as a party in a running down action, which is only between the third-party claimant and the insured (and/or the rider or driver of the insured motor vehicle). Thus, if the cause papers are not served on them, then they may be in the dark, particularly if the cause papers are served directly to the insured and the latter decides not to inform the insurer of the fact that there is a running down suit. No doubt, under the terms of the motor-insurance policy, the insured is obliged to notify the insurer of any legal

A action involving the insured motor vehicle. But, the insured's failure to abide by the terms of the motor-insurance policy is a matter solely between the insurer and the insured and does not affect the insurer's liability under s 96(1) of the RTA.

B **[29]** Hence, at times the insured may be nonchalant about their obligations under the terms of the motor-insurance policy and may not notify the insurer of the legal action involving the insured motor vehicle.

C **[30]** In a more sinister situation, the insured may well be in cahoots with the third-party claimant in putting up a false claim — where an accident involving the third party may well have occurred, but it did not involve the insured vehicle, and the insured, for monetary gain (*or for other reasons*) may lodge a false police report to implicate the insured vehicle. In that scenario, it is a D virtual certainty that the insured will not inform the insurer of the legal action.

[31] Hence, given that the insurer being the ultimate paymaster (s 96(1) of the RTA) if judgment is entered against the insured, it is not just desirable, but imperative and necessary for the insurer to have control and conduct over the E running down action. But this can only happen if the insurer is aware that a suit has been filed against their insured. That was exactly the problem vis a vis the Georgetown Suit and which, the defendants (through the testimony of SD1 and D1) say, was the reason for the creation and circulation of the impugned email to their claims examiners and their panel of solicitors.

F

[32] Indeed, it is significant that D3's TPBI manual states at para 4.1 that lawyers should be appointed when the claims examiner encounters the situation envisaged in that paragraph which reads (relevantly) as follows:

G 4.1 WHEN SHOULD YOU APPOINT LAWYERS?

– For all lawyers identified to have the tendency to serve summons direct on the Insured and taking JID.

– For all identified blacklisted lawyers unless the examiner is satisfied with the H adjusters report that it is a genuine claim.

– If summons are received and it contains a mention date which has passed.

– Where there is a third party claim filed and the insured turns out to be difficult ie do not want to cooperate with adjusters etc.

I – For cases filed in Kulim MCCA as the judge is imposing JIDs. (Emphasis added.)

[33] In most cases, there is no problem as the insurer will be aware of the running-down suit as the papers would be either brought to their attention by their own insured, or the papers may have been served on them by the third

party's solicitors. Usually, it is the latter situation that enables the insurer to become aware of the suit as the insured may at times take a lackadaisical attitude and just ignore the legal action. But there is always the possibility of a more sinister situation (*which from the decided cases appears to be quite rampant*), where the insured nefariously collaborates with the third party to make a 'false claim' by fraudulently implicating the insured vehicle to the accident.

[34] Such an insured will certainly not be incentivised to draw the attention of the insurer to the fact that cause papers have been served on him. Hence, it is not always the case that the insurer is made aware of the suit against their insured.

[35] In some cases (*as happened in the Georgetown Suit*), the insurer is only served with the statutory notice (s 96(2) of the RTA) whilst the cause papers for the running down suit are served directly on their insured and/or the driver/rider. Now, by the terms of the motor vehicle policy of insurance, the insured is not permitted to admit liability and is obliged to forward the cause papers to the insurer so that they (insurer) will investigate the claim and have conduct and control over the running-down suit and any appeal therefrom. But that does not always happen and the insured may well display indifference or nonchalance to their contractual obligations under the motor vehicle policy of insurance and omit to inform the insurers of the existence of the running-down suit. Hence, the insurer will be in the dark as to the existence of the running-down suit and by the time they become aware of it, it will be was too late to do anything.

[36] Thus, for all the right reasons, it is absolutely imperative for motor vehicle insurers to have conduct of the running down action right from the beginning because of their statutory liability towards the third-party claimant in the event judgment is entered against their insured (or the rider/driver of the insured motor vehicle) (s 96(1) of the RTA).

[37] Although the insurer of the insured motor vehicle is the ultimate paymaster for any judgment that is obtained against their insured, there is (*rather curiously*) nothing in s 96(1) of the RTA which makes it mandatory for the solicitors for the third party to serve the writ on the insurer to give notice that the suit has in fact been filed and giving details of the mention date or case management date etc. And because of this lacuna, some solicitors, including the plaintiff, take the position that they are not required to, and are under no obligation whatsoever to serve the cause papers on the insurer and would rather serve it directly on the insured, who will most likely demonstrate nonchalance and may not even notify the insurer of the legal suit that had been served on the insured.

[38] And it is highly likely that the insured will not even turn up in court for the mention or case management. Thus, this will give the third party's solicitors an 'easy run' as they will be able to obtain judgment in default on liability (regardless of the insured's degree of culpability for the motor-vehicular accident), and thereafter proceed with assessment of damages on another day (per O 13 r 2 of the Rules of Court 2012). Again, the problem is compounded by the fact that there is nothing in the RTA which obliges the said third party's solicitor to inform the insurer of the fact the judgment in default (liability) had been entered and that the matter has been fixed for assessment of damages. In our view, the invidious and disadvantageous position that insurers find themselves in should be rectified by Parliment amending s 96 of the RTA to make the insurer's liability to pay on the judgment conditional upon proof of service of the writ and statement of claim on the Motor-Claims Department of the insurer located at its Head-Office.

[39] Further, and for completeness, the Rules of Court 2012 should also be amended to provide that there should be no judgment in default against an insured or driver/rider (*whether on liability and/or quantum — assessment of damages*) where it involves liability of an insurer under s 96(1) of the RTA, unless there is evidence by way of an affidavit of service, to show that the insurer has been served with the writ and statement of claim before the case comes up for case management.

[40] If the Rules of Court 2012 is amended along the lines as stated above, then the third-party's solicitor will be duty bound to serve the cause papers on the insurer. This will not be an onerous duty on the third-party's solicitor as they would have previously served the s 96(2) of the RTA notice on the insurer and all that has to be done is to serve the cause papers on the insurer. Thus, presently the insurer will only come to know of the legal suit against their insured when the third party's solicitors serve the sealed judgment on the insurer and demand payment (per s 96(1) of the RTA). But as a matter of practice, many solicitors acting for the third party will serve the cause papers on the insurer so that they (the insurer) will promptly negotiate a settlement directly with the third party's solicitors (if that is possible) or in any event, to enable the insurer to appoint their solicitors to handle the matter until completion. It is common ground that this is only a matter of practice.

[41] This practice is in accord with common sense and commercial sense as it is wasteful exercise to proceed without the insurer's solicitors being present and in obtaining judgment by default as there is a real possibility that the judgment in default may be set aside and the process will then go back to the starting point much to the prejudice and disadvantage of the injured third party or dependants of the deceased third-party victim of the road accident. But common sense and commercial sense is sometimes woefully in deficit.

[42] Thus, as it stands, everything depends on the solicitor who acts for the third party. If they chose not to serve the cause papers on the insurer, then there is a possibility that the insurer may be unaware of the suit and this may lead to judgment in default being entered against the insured.

[43] It must be emphasised that in this case the plaintiff had made it crystal clear during the trial particularly during cross-examination of the defendants' witnesses that this is only a practice and that any judgment that is obtained will not per se suffer from irregularity. Thus, some solicitors have gained notoriety due to their practice or tendency of just giving the notice under s 96(2) of the RTA and then going ahead with the case against the insured without serving the cause papers on the insurer. That is the situation that is presented in the present case vis a vis the Georgetown Suit. We will come back to this issue in greater detail in due course.

[44] We mentioned earlier that an insurer is liable to pay on any judgment that is entered against their insured. But where the insurer suspects there is 'fraud', for example where the insured is found to be collaborating with the third-party claimant and participates in the fraud by lodging a false police report to implicate the insured motor vehicle in the alleged motor vehicle accident, then the insurer may, *before any judgment in the running-down action is entered*, apply to the court under s 96(3) of the RTA, usually though an originating summons, and obtain a declaration that the insurance policy is void and that therefore they (the insurer) are not liable for any judgment arising from the alleged involvement of the insured motor vehicle in the purported motor-vehicular accident.

[45] Section 96(3) of the RTA reads as follows:

> (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

[46] Thus, after obtaining the declaration under s 96(3) of the RTA, the insurer will usually withdraw from participating in the running down action and will instruct their lawyers to discharge themselves from acting for the insured (and the rider/driver as the case may be).

[47] This is what happened in the Kulim Suit. It needs to be emphasized here that contrary to what the plaintiff had sought to portray, the Kulim Suit was *not* a case where the defendant (insured) was unrepresented. At all times the insured in the Kulim Suit was represented by OHC but they chose not to participate in the trial. But on the other hand, in the Georgetown Suit, the defendant (insured) was unrepresented.

AMGENERAL INSURANCE BHD V SA' AMRAN A/L ATAN

[48] Since we are on the topic of s 96(3) of the RTA, we think that it is necessary to mention here that in *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 8 CLJ 175 (FC) ('Sa' Amran'), the Federal Court had enunciated that where fraud is suspected, then the *insurer should intervene* in the running down action and participate in the trial and obtain a declaration (perhaps through a counterclaim) that the insured motor vehicle is not involved in the accident which would absolve them of any liability for the accident.

[49] According to the Federal Court, the issue of non-involvement of the insured motor vehicle in the accident cannot be dealt with via an originating summons under s 96(3) of the RTA but rather, evidence of the alleged non-involvement of the insured motor vehicle in the accident must be adduced at the trial of the running-down action. This is also to prevent duplicity of proceedings. The Federal Court opined that an application under s 96(3) of the RTA was only for determining that the insurance policy is void and unenforceable and not for determining core issues in the tort of negligence. Thus, the question whether the insured driver/rider was involved in the accident was an issue of tort and not of contract.

[50] As such, an application under s 96(3) of the RTA cannot be utilised to determine core factual issues in the tort of negligence such as the issues of liability and damages. At any rate, in so far as an insurers' right to intervene in the running-down suit is concerned, the issue has been decisively dealt with by the Court of Appeal in the case of *Mohammad Hafizi bin Bahari & Anor v Pacific & Orient Insurance Co Bhd & Anor and another appeal* [2024] 4 MLJ 223 (CA).

[51] In that case, the Court of Appeal held that the insurer had a right to intervene in the negligence suit in view of the insurer's statutory liability under s 96(1) of the RTA where it was 'necessary' for the insurer to intervene in the negligence suit. It was just that the insurer be allowed to intervene in the negligence suit so as to ensure that the sessions court could decide whether the negligence suit had been fraudulently filed by the third-party claimants.

[52] The insurer's right to intervene and protect their legal and commercial interest was recently discussed by the Court of Appeal in the case of *Jiwaneswary a/p Raman v Etiqa General Takaful Bhd* [2023] 2 MLJ 437; [2023] CLJU 93; [2023] 1 LNS 93 (CA) ('Jiwaneswary'). In *Jiwaneswary* the Court of Appeal emphasised that an insurer does not have to take the s 96(3) of the RTA route and that they could intervene in the running down action especially where they intend to show that the insured motor vehicle was not involved in the accident and that there was collusion between the insured and the third-party claimant.

[53] Once an insurer is added as intervener, they can then put the plaintiff to proof that the insured vehicle was in fact involved in the alleged accident. Thus, it is only when the plaintiff has discharged their burden (s 101 of the Evidence Act 1950) in proving that the accident was caused by the involvement of the insured motorcar that the burden would shift to the insurer to prove fraud. See: *Tang Loon Pau & Ors v Mohd Salihin bin Kotni & Anor* [2023] MLJU 1619; [2023] 8 CLJ 105 (CA).

[54] In so far as the application under s 96(3) of the RTA is concerned, it is clear that the application must be served on the party which is the plaintiff in the running-down action. Thus, the insurer of the motor vehicle which is purportedly involved in the motor-vehicular accident may not go behind the back of the third-party claimant (*so to speak*) and obtain the order under s 96(3) of the RTA. See: *Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria Demadu* [2021] 1 MLJ 303 (CA) per Mary Lim Thiam Suan JCA (later FCJ) paras 68–69: *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi (seorang tak berupaya dan dalam kecacatan/koma mendakwa melalui sahabat wakil dan ibu bapa yang sah Hamsudi bin Nin'ada dan Suneya bt Asbam) & Ors* [2016] MLJU 1317; [2017] 4 CLJ 572; [2017] 2 MLRA 659 (CA) per Varghese George JCA at paras 31–32 and 41.

[55] The principle that was decided in these cases is that the insurer's application under s 96(3) of the RTA must be served on the third-party claimants in the running-down action. The principle was endorsed by the Federal Court in *Sa'Amran* (see: Federal Court's discussion and conclusions at paras 70–101). Thus, prior to *Sa'Amran* the jurisprudence was that an insurer may avoid liability to pay under a judgment obtained in the proceeding commenced by a third party for damages for bodily injuries or death sustained in a road accident caused by or arising from the use of the insured vehicle, if a declaration is obtained under s 96(3) of the RTA to declare the policy as null and void but this must be procured *before* judgment in the running-down suit in pronounced. See: *Ahmad Nadzrin bin Abd Halim & Anor v Allianz General Insurance Co (M) Bhd* [2015] 6 MLJ 223; [2015] 9 CLJ 821 (CA).

[56] Needless to say, the declaration must relate to the policy of insurance (or cover note) which covers the date of the accident which gave rise to the running down action. Hence, if the s 96(3) declaration relates to a policy period which does not cover the date of the accident, then that declaration is to say the least, quite useless. That is the key problem in the Kulim Suit which will be elaborated on in the latter part of this judgment.

BACKGROUND

[57] We now deal with the background events leading up to the filing of the defamation suit. It is fair to say that prior to the publication of the impugned email, the plaintiff and D3 had skirmishes arising out of the Georgetown Suit and Kulim Suit. The plaintiff alleges that the Kulim Suit is causally connected to the impugned email (para 16 — of the statement of claim) whereas the defendants contend that the impugned email was sent out because of their unpleasant experience with the plaintiff over the Georgetown Suit. The plaintiff claimed that the defendants acted maliciously when the outcome of the Kulim Suit was adverse to them due to their own 'blunder', (*referring to the wrong cover note in the s 96(3) application*) which led to the plaintiff taking the stance that he would enforce and/or execute the judgment obtained in that suit.

[58] Essentially, the defendants contend that the narrative of the events that happened in the Georgetown Suit are completely aligned with the gist of what was conveyed by the impugned email and bears no connection to the events that transpired in the Kulim Suit. Regardless of whether the impugned email was issued because of the Georgetown Suit or the Kulim Suit, it is clear that both these suits were problematic for D3, which will be elaborated in the later part of this judgment.

[59] As stated earlier, the defendants contend that the impugned email was issued because of what transpired in the Georgetown Suit, whereas the plaintiff maintains that the impugned email was in retaliation for the actions that he had taken on his client's behalf in the Kulim Suit, including the recovery action (viz Georgetown Sessions Court Recovery Summons No PA-B52–06–12 of 2017 against D3 as the insurer) and winding up notice etc.

[60] Since the impugned email was issued because of their experience with the plaintiff over the Georgetown Suit, it is contended by the defendants, that the words appearing in the impugned email: (a) were not defamatory in their literal meaning or implied, inferred or indirect meaning; and (b) there was no malicious intent by D1 in issuing the impugned email; and (c) the impugned email was issued to 27 recipients (*in line with the TPBI Manual*) as a compelling risk management measure within D1's job scope to safeguard D3's interest, as

the insurer and ultimate paymaster of a bodily injury claim where their insured (defendant in the running-down action) is unrepresented, as reflected on the facts of the Georgetown Suit.

[61] On the other hand, it is the plaintiff's allegation that the impugned email was related to the Kulim Suit. So much has been said about the Georgetown Suit and the Kulim Suit that it becomes necessary to examine these two running down actions in some detail to appreciate what took place in those suits.

GEORGETOWN SUIT

[62] In the Georgetown Suit, plaintiff had filed a running-down action for one Ravendran a/l Kalangiam ('the claimant') who claimed to be the victim of a road accident on 7 February 2016 involving D3's insured motorcycle No PHF 2490. The plaintiff gave the requisite notice dated 5 September 2016 under s 96 of the RTA that an action will be commenced.

[63] The notice was received on 13 September 2016 by D3's claims division. D3 responded via letter dated 22 September 2016 (written on a without prejudice basis) wherein they asked the plaintiff to provide all the relevant documents and information in support of the claim.

[64] D3's letter stated, 'We are keen to explore the possibility of an out of court settlement. As such, we would be obliged if your good selves would refrain from filing any civil action against our insured until such time when negotiations for settlement has been exhausted'. The letter stated that the claim was handled by Christy @ Marella Joseph (DW5).

[65] Nothing came out of this. Further, Christry @ Mareela Joseph (DW5) also did not appoint any solicitor to have conduct of the claim. At any rate, on 9 June 2017, the plaintiff filed the Georgetown Suit. In the Georgetown Suit, it is undisputed that Mohd Fazli bin Mohd Salleh was named as first defendant, the rider of the insured motorcycle No PHF 2940 and Normah bt Hashim (the insured) was named as second defendant.

[66] Significantly, the cause papers were not served on D3. They were served directly on the insured and the alleged rider. Thus, the defendants named in the Georgetown Suit did not turn up and a judgment in default ('JID') was entered against the defendants (who were unrepresented) on 16 August 2017 followed by an order for assessment of damages, which was also entered by default ('default order') on 6 September 2017.

[67] Arising from the JID and the default order, D3 appointed Messrs Zaid

Ibrahim & Co ('ZICO') to set aside the JID and default order. The JID and the default order were subsequently set aside via an application by ZICO. Anita and Lim were involved in the setting aside application. The complication in the Georgetown Suit stemmed from the insured's omission or failure to notify D3 of the service of the cause papers. In the statement of claim (in the Georgetown Suit), the claimant had stated that on 7 February 2016, he was riding motorcycle No PLS4299 when he met with an accident involving the insured motorcycle No PHF 2940 and that the rider of the insured motorcycle was the first defendant, or Mohd Fazdli bin Mohd Salleh ('Fazdli').

[68] On 9 February 2016, Fazdli lodged a police report stating that the insured motorcycle was involved in an accident with motorcycle No PLS 4299 but he stated the date of the accident as 7 January 2016. On 11 February 2016, Fadzli lodged another report to correct the date of accident as 7 February 2016. The insured (second defendant) was Normah bt Hashim. The writ/statement of claim were served directly on the insured on 23 June 2017. On 16 August 2017, judgment in default (liability) was entered against the defendants in the Georgetown Suit.

[69] The fact that judgment in default (liability) was entered against the defendants in Georgetown Suit was not communicated to D3 by the plaintiff (*as he was under no legal obligation to do so*). The plaintiff then proceeded to carry out an assessment of damages on 22 August 2017 and judgment for the sum of RM20,000 was then entered against the defendants on 6 September 2017.

[70] By a letter dated 16 October 2017, the plaintiff demanded payment from D3 based on the judgment dated 16 August 2017 (liability) and assessment order dated 6 September 2017 (quantum).

[71] On 23 October 2017, ZICO (acting on D3's instructions) applied to set aside the judgment dated 16 August 2017 and 6 September 2017. The application was supported by an affidavit filed by Lim of ZICO and a further supporting affidavit by DW5. She stated that D3 was not served with the cause papers and were not aware of the Georgetown Suit.

[72] At para [8] of her affidavit, she stated that D3 had appointed Darmani Adjusters and Investigators Sdn Bhd to investigate the claim and the said adjusters had discovered that Fazdli had lodge a false police report implicating the insured motorcycle as having been involved in an accident with motorcycle No PLS 4299.

[73] After being interviewed by the adjusters, Fazdli had then lodged a police report on 21 October 2017 where he stated that the insured motorcycle was

not involved in accident with motorcycle No PLS 4299 and that he had lodged the earlier report upon being asked to do so by a friend for the purpose of facilitating a false insurance claim.

[74] He stated, 'SAYA MAHU MEMBUAT REPOT PEMBETULAN REPOT SAYA NO 03310/16 TRAFIK TIMUR LAUT TARIKH 7/2/2016 SEPERTI BERIKUT SEBENARNYA SAYA TIDAK TERLIBAT DI DALAM KEMALANGAN PADA 7/2/2016 JAM LEBIH KURANG 8.15 PAGI MELIBATKAN M/SIKAL No PHF 2940 DENGAN M/SIKAL PIHAK KE TIGA NO PLS 4289. SAYA DI MINTA OLEH SEORANG KAWAN UNTUK MEMBUAT REPOT INI BERTUJUAN UNTUK MEMBUAT TUNTUTAN INSURAN PALSU. SAYA MENGAKU BAHAWA SEGALA KANDUNGAN DI REPOT TERSEBUT ADALAH TIDAK BENAR SAYA MEMBUAT REPOT PEMBETULAN INI SECARA IKHLAS TANPA APA-APA HASUTAN DAN PAKSAAN'.

[75] Fazdli also gave a statutory declaration dated 23 October 2017 where he had stated:

1. Pada 09/02/2016 jam lebih kurang 00.09 t/mim saya telah membuat satu repot kemalangan di Trafik Timur Laut bernombor K003319/16 mengaitkan motosikal saya bernombor PHF2940 dengan sebuah motosikal pihak ketiga bernombor PLS4299.
2. Sebenarnya 7/2/2016 adalah hari Ahad dan saya tidak bekerja dan berada di rumah dan bukannya dari tempat kerja hendak bersarapan seperti didalam kandungan repot polis saya.
3. Laporan polis TRAFIK TIMUR LAUT/00319/16 dibuat oleh saya atas tunjuk ajar oleh kawan dan bukannya atas pengetahuan saya sendiri. Tujuan laporan polis tersebut adalah untuk membuat tuntutan insuran terhadap syarikat Insuran yang melindungi motorsikal bernombor pendaftaran PHF 2940. Segala kandungan didalam repot ini adalah tidak benar.
4. Akibat maklumat palsu didalam repot saya, dengan ini saya tidak mahu melibatkan diri dengan apa-apa tuntutan insuran oleh pihak penunggang motosikal No PLS4299.
5. Saya dengan rela hati telah membuat repot pembetulan pada jam 1405pm, 21/10/2017 bernombor TRAFIK TIMUR LAUT/023713/17 dimana kandungannya adalah benar dan betul.
6. Saya membuat pengakuan diatas secara rela hati dan tidak melibatkan apa-apa unsur hasutan, paksaan atau melibatkan sebarang jenis pampasan dari mana-mana pihak.

[76] The application by D3 to set aside the judgment was vehemently objected to by the claimant. In his affidavit in reply affirmed on 7 November

2017, the claimant stated, inter alia, see para 7:

> Peruntukkan di bawah seksyen 96(1) Akta Pengangkutan Jalanraya 1987 adalah satu peruntukkan mandatori dan sejurus penerimaan Notis ini, firma peguamcara seharusnya di lantik tanpa sebarang alasan *dan juga tidak ada sebarang peruntukkan untuk peguamcara saya menghantar sebarang kertas kausa Mahkamah kepada syarikat insurans kerana ini tidak diperuntukkan di dalam Akta Pengangkutan Jalanraya 1987*. Kegagalan oleh syarikat insurans untuk bertindak dalam satu masa yang munasabah (*to act within a reasonable period of time*) untuk melantik peguamcara adalah kesalahan mereka sendiri dan mereka sekarang tidak boleh mendapat peluang sekali seperti *'second bite at the cherry'* untuk satu Perintah Interim Ex-parte Stay serta untuk mengetepikan penghakiman ingkrar ini. Kegagalan peguamcara Defendan-defendan untuk membuat seperti apa yang diperuntukkan di bawah sec 96(1) Akta Pengangkutan Jalanraya 1987 adalah kesalahan mereka sendiri.

[77] Fazdli filed an affidavit affirmed on 3 November 2017, stating that he had previously lodged a false police report so as to enable a false insurance claim to be made. *On 26 October 2017, the magistrate had ordered an ex parte interim stay a proceeding pending disposal of the application to set aside the judgment in default*. However, it is significant to note that *despite being informed of the stay of proceedings, the plaintiff threatened to execute on the judgment that was obtained in the Georgetown Suit*.

[78] On 16 November 2017, the magistrate allowed the application filed by ZICO and the judgment in default (liability) dated 16 August 2017 and the assessment order dated 6 September 2017 were set aside. the defendants were given leave to file their defence to the Georgetown Suit. The claimant appealed to the High Court via a notice of appeal dated 22 November 2017. On 22 November 2017, the defendants in the Georgetown Suit filed a defence (through ZICO) asserting that the insured motorcycle was not involved in the said accident on 7 February 2016.

[79] On or about 6 December 2017, D3 then filed an application in the High Court in Kuala Lumpur via Originating Summons No WA-24NCC-557–12 of 2017 ('OS 557') for a declaration that the motor vehicle policy for motorcycle No PHF 2940 was null and void and unenforceable vis a vis the purported accident on 7 February 2016 involving motorcycle No PLS 4299 and the insured motorcycle. OS 557 was filed on 12 December 2017.

[80] It is important to mention here that during cross-examination, the plaintiff agreed that he was served with a copy of OS 557 sometime in the middle of December 2017. The significance of this date is that OS 557 is in relation to the events that transpired in the Georgetown Suit. On 23 February 2018, the High Court allowed D3's application via OS 557. The claimant

appealed to the Court of Appeal via Court of Appeal Civil Appeal No W-02(NCC)(A)-554–03 of 2018. The appeal was later dismissed on 22 October 2018. Hence, it is quite apparent that the issues in relation to the debacle surrounding the Georgetown Suit were still on-going even as at middle of December 2017 which is proximate to the date when the impugned email was issued and sent to the respective recipients.

[81] Hence, the defendants' case is that the impugned email was circulated to the claims examiners and panel solicitors to prevent the recurrence of such circumstances as occurred in the Georgetown Suit. It was for this reason that D1, in her capacity as Senior Claims Manager, devised a risk management measure as contained in the impugned email. According to D1, by the said email she was only instructing D3's panel solicitors to make an inquiry with the court interpreter as a measure to safeguard the interest of the D3 and also the interest of the insured, rather than vilifying the plaintiff. We turn now to the Kulim Suit.

THE KULIM SUIT

[82] We may now examine the events that took place in the Kulim Suit and related legal proceedings. D3 had obtained a declaration under s 96(3) of the RTA via order dated 9 March 2016 in Alor Setar High Court Originating Summons No 24NCVC-797–11 of 2015 ('OS 797'), to declare as null void the motor insurance policy for the insured motorcar No PJK 1445 with Certificate of Insurance No 14 VBU 043956 *for the period 11 November 2014 to 10 November 2015*.

[83] Pursuant to this order, D3 was (allegedly) exempt from liability for the alleged accident on 14 February 2014 at 11.15pm involving the insured motorcar No PJK 1445 and the third-party motorcycle No PKG 3814. But, it can be seen quite clearly that the accident allegedly involving the insured motorcar took place on *14 February 2014* whereas the insurance policy that was the subject of OS 797 was for the period (commencing) from 11 November 2014 and ending on 10 November 2015. Hence, the order obtained in OS 797 did not cover the date of the accident. This was clearly a bungle. It was later rectified, but it was too late because by the time the order was amended (in 2018), judgment had already been entered (1 November 2017).

[84] In so far as the trial of the Kulim Suit is concerned, what happened is this. On 2 October 2017, the court in the Kulim Suit had proceeded with the case. Counsel for the defendants (appointed by D3) Zamri was present but did not participate in the trial as his firm, OHC were instructed to discharge themselves. But OHC were only able to discharge themselves on 16 October

2017, which is after the trial had concluded. On 1 November 2017, the court gave judgment in favour of for the third-party Kalaiarusan a/l Murugam in the sum of RM512,669.16 (general and special damages excluding interest) and costs of RM44,520.

[85] It may be noted here that the order dated 1 November 2017 in fact acknowledged that, 'Peguamcara Defendan-Defendan telah menfailkan Notis Permohonan untuk menarik diri daripada mewakili Defendan-Defendant ...'. Again, it needs to be emphasised that on the date of the trial (2 October 2017) OHC was still on record for the insured, except that Zamri chose not to participate in the trial. At any rate, D3 made payment on the judgment sum on 30 March 2018.

WHETHER THE IMPUGNED EMAIL WAS DEFAMATORY

[86] According to the plaintiff, the natural and ordinary meaning of the words appearing in the impugned email are as per 16.1(a) to (e) of the statement of claim:

a. Plaintif membuat taksiran di Mahkamah secara mencurigakan dan/atau menyalahi undang-undang tanpa peguam Defendan-Defendan dilantik dalam sesebuah kes;

b. Kelakuan Plaintif di Mahkamah adalah mencurigakan;

c. Plaintif terkenal dengan membuat taksiran tanpa kehadiran Peguam Defendan-Defendan dilantik secara mencurigakan dan kemungkinan besar Plaintif akan membuat taksiran secara tipu/frod terhadap Allianz General Insurance Company (Malaysia);

d. Plaintif adalah secara langsung dan/atau tersirat melakukan penipuan/frod terhadap kes-kes dimana Allianz General Insurance Company (Malaysia) Berhad adalah penanggung insurans untuk yang terlibat dalam motor kenderaan-motor kenderaan kemalangan jalanraya dengan tuanpunya/pemandu/penunggang yang diwakili oleh Plaintif;

e. Plaintif adalah peguamcara dari firma peguamcara yang sepertimana terlibat dalam menjalankan kes-kes mereka tanpa beretika dan/atau professional, terutamanya tanpa memberi tahu melalui Notis dibawah seksyen 96(2) Akta Pengangkutan Jalanraya 1987 kepada Defendan-Defendan dan secara 'sembunyi' melakukan penipuan dan/atau frod terhadap Defendan-Defendan.

[87] According to the plaintiff (*per his witness statement*), the contents of the impugned email are defamatory because in the ordinary and natural meaning the words therein also convey to the reader:

a) That the plaintiff assess damages in courts in a *suspicious manner and/or illegally* without lawyers appointed for the civil cases;

b) That the plaintiff's conducts in the courts is *suspicious*:

c) That the plaintiff well known for *assessing damages suspiciously without the present of the appointed Defendants' lawyers* in a particular case and it is highly possible that the plaintiff assesses damages against Allianz General Insurance Company (Malaysia) fraudulently;

d) That the plaintiff directly and/or Indirectly commits and act of *cheating/committing fraud* in cases involving the Allianz General Insurance Company (Malaysia) as the insurer for the vehicle involved in the road accidents by representing the owner/driver/pillion rider;

e) That the plaintiff is an advocate & solicitor from the firm of Subramaniam & Shafiq conducting his cases *unethically and/or unprofessionally especially committing fraud and/or cheating the defendants* without sending the statutory Notice as under Section 96(2)(a) of the Road Transport Act 1987 to the defendants and *cheating and/or commit fraud without the Defendant's knowledge*;

f) That the plaintiff is from a legal firm which is well known for *undertaking cheating and/or fraudulent cases where its lawyer assesses damages fraudulently* in the court;

g) That the plaintiff is a *fraudster who cheats the court* in order to assess claims in a particular case;

h) That the plaintiff is a *dangerous person and a fraudster and a criminal* by *assessing claims* in a particular cause of action *fraudulently and obtains false monetary claims* from insurance companies;

i) That the plaintiff's conduct and attitude are *immoral, Improper, unprofessional, irresponsible, Incompetent, untrustworthy and unethical* by making claims based on assessment in road accident cases by *cheating the court and insurance companies* including the 3rd Defendant;

j) That the plaintiff *prevents justice and/or obstructs the court proceedings*;

k) That the plaintiff is from a legal firm which *conducts fraud cases by misusing the court proceedings*;

l) That the legal services provided by the plaintiff is against the Court proceeding and/or the existing law and order;

m) That the plaintiff *commits the crime* in the said circumstances which can be punished under the law;

n) That the plaintiff is an advocate and solicitor practicing law *unethically, immorally, and unprofessionally and embracing other legal practitioners by assessing damages illegally*;

o) That the plaintiff is a senior lawyer who *lies and cheats in court*;

p) That the plaintiff is an *immoral and also greedy person*;

A TRIAL

[88] The following witness testified at the trial:

SP1	Siva Subramaniam a/l M Shanmugam (plaintiff)
SD1	Sufaaizah bt Abdul Shukor (D3's Claims Manager)
SD2	Anita Kaur — Zaid Ibrahim & Co (Penang) (D3's Panel Solicitor)
SD3	Lim Wen Jack — Zaid Ibrahim & Co (Penang) (D3's Panel Solicitor)
SD4	Jayapragash Amblavanar (D2) Head of D3's Claims Division
SD5	Christy @ Marcella Joseph (D3's Claims Examiner)
SD6	Zamri Ali Hassan — Othman Hashim & Co (D3's Panel Solicitor)
SD7	Frances Joycelyn Nathan (D1) (Senior Claims Manager of D3)

THE PLAINTIFF'S TESTIMONY

[89] The relevant part of plaintiff's testimony (per his witness statement) was as follows:

> 9. Question: What did you infer from the said email?
>
> Answer: From the said email, the 1st Defendant had defamed me by publishing defamatory remarks stating that my firm and I had wrongly, negligently, Illegally and and/or recklessly assessed claims without the Defendants appointing lawyers for the matter.
>
> In addition to that, the 1st Defendant had directly or by way of innuendo stated that had acted suspiciously and had made fraud assessment and/or claims towards the 3rd Defendant.
>
> In furtherance, the 1st Defendant had also directly or by innuendo stated that my firm and I had unethically and/or unprofessionally handled cases without serving the section 96 of the Road Transport Act 1987 Notice to the Defendants and had discreetly and/or in a clandestine manner committed fraud/cheated against the 3rd Defendant. From the said email, people who had read the email will have the perception that I was famous for proceeding with cases and/or assessing the cases without notifying the solicitors acting for the insurer and also handling fraudulent cases and thus my firm and I had defrauded/cheated the 3rd Defendant.
>
> ...
>
> I am dangerous and a criminal, fraudster by making assessment to fraudulently get claims from insurance companies. Furthermore, the 1 Defendant was also claiming that my firm and I had acted immorally, Improperly, unprofessional, irresponsible, incompetent, untrustworthy, unethically by making assessment in accident matters

by defrauding the Court and also Defendants and at the same time had misused and/or abused the Courts' process.

The said email had also impliedly or by innuendo stated that I as a senior lawyer was a liar, greedy and had bad intentions to defraud the Court and also insurance companies in Malaysia. In furtherance, the said email can also be implied indirectly and/or by innuendo that I am a senior lawyer who was qualified, unfit, not credible in mentoring junior lawyers. Further also that I am not fit to be a member of the Malaysian Bar which I have been since March 1997.

10. Question: Do you know why the 1st Defendant had published the said email?

Answer: The 1st Defendant had published the said email because of several accident cases that was handled by my firm and I wherein the 3rd Defendant was the insurer for the motor vehicles. The said suits are as follows:

– Kulim Sessions Court Summons No A53KJ-126–07/2017 (hereinafter referred to as 'Kulim Sessions').

– Georgetown Sessions Court Recovery Summons No PA-B52–06–12/2017 (hereinafter referred to as 'Georgetown Sessions').

– Georgetown Magistrates Court Summons No PA-A73KJ-513–06/2017 (hereinafter referred to as 'Georgetown Magistrates').

11. Question: What was the case that caused the 1st Defendant to publish the said email?

Answer: I had acted for Kalalarasan a/l Murugan (hereinafter referred to as 'my client') in 'Kulim Sessions' wherein the case was litigated and judgment was awarded on 01.11.2017. by the Court

Kindly refer to Page 33–37 of the Common Agreed Bundle of Documents. I humbly pray for the document to be marked as *following the judgment dated 01.11.2017, I Initiated a recovery action towards the 3rd Defendant as the insurer for the motorcar No PJK 1445 through the recovery suit 'Georgetown Sessions' since the 3rd Defendant refused to make the payment of the judgment sum as awarded in 'Kulim Sessions'*.

I therefore believe that it was after the 'Georgetown Sessions' that the 1st Defendant had published the said email and it was 'the final straw that broke the camel's back.'

12. Question: Why did the 1st Defendant state that you and your firm are assessing claims without the defendant's lawyers being appointed?

Answer: This is because the case of 'Kulim Sessions' had proceeded on 02.10.2017 for hearing without the attendance of the Defendants' solicitors

I believe that following this incident of 'Kulim Sessions', the 1st Defendant acting on the second Defendant's instructions and published the said email containing defamatory remarks towards my firm and I.

13. Question: Do you know whom did the Defendants appoint to represent them in the 'Kulim Sessions'?

Answer: Yes, they had appointed Messrs Othman Hashim & Co to represent them in 'Kulim Sessions'.

14. Question: Did a lawyer from Messrs Othman Hashim & Co came for the Hearing on 02.10.2017 for 'Kulim Sessions'?

Answer: No

15. Question: Why did the lawyer did not appear for 'Kulim Sessions'?

Answer: The lawyer did not appear because I believe that the 3rd Defendant had obtained a declaration at Alor Setar High Court on 09.03.2016 to declaration that the 3rd Defendant is not liable for the road accident on 14.02.2014 between 'my client' and the insured of the 3rd Defendant. With this declaration I suppose that the Defendants were confident that they need not have to defend the 'Kulim Sessions' and/or protect their interest.

16. Question: Were you or your firm notified (i.e., notice and/or cause papers being served) of the intention to seek for declaration by the lawyer acting for the Defendants at Alor Setar High Court?

Answer: No My firm or even my Client was not served with such notice and/or any cause papers.

17. Question: Then what happened on 02.10.2017 when the Defendants' lawyer failed to appear on the said date?

Answer: The matter was litigated as it was fixed for hearing and the Defendants' lawyers had never informed or gave any prior notice to the court or to my firm on the reasons why they did not appear on 02.10.2017.

18. Question: Do you know what was the reason that Messrs Othman Hashim & Co did not appear in Court on 2.10.2017?

Answer: I do not know the exact reason why the Defendants' lawyer did not appear on the hearing date but prior to the hearing date my firm had received an application on 05.09.2017 from the Defendant's solicitor to strike out the action in 'Kulim Sessions' matter which had exhibited a declaration order granted by the Alor Setar High Court on 09.03.2016.

I believe that with the attainment of the said declaration order, the Defendants' lawyer must have thought their attendance in the 'Kulim Sessions' is no longer needed.

However, my firm had also received another application to discharge themselves as the lawyers acting for the 3rd Defendant (received on 06.10.2017).

Both these applications were heard on 16.10.2017, wherein the Defendants' lawyer had obtained order in terms to discharge themselves as the solicitors acting for the insured and the owner of the motor vehicle insured with the 3rd Defendant and further their application to strike out our 'Kulim Sessions' was withdrawn.

19. Question: Do you think that the lawyers acting for the Defendants knew about the hearing date for 'Kulim Sessions' on 02.10.2017?

Answer: I would think so because they did file an application to strike out our Kulim Sessions on 29.08.2017 and it was fixed for hearing of application on 04.09.2017

and more ever, on 16.10.2017 the 3rd Defendant's solicitor had withdrawn the said application.

20. Question: Why did the 3rd Defendant's lawyer, Messrs Othman Hashim & Co had discharged themselves as the solicitors acting in the case A53KJ-216–07/2017?

Answer: The 3rd Defendant's lawyer had discharged themselves from representing the Defendants in the 'Kulim Sessions' because they had obtained a declaration order from the Alor Setar High Court on 09.03.2016 stating that the 3rd Defendant is not liable to provide coverage for the motorcar No PJK 1445 on 11.11.2014 to 10.11.2015 (which was involved in the road accident on 14.02.2014 with 'my client's' motorcycle). (Emphasis added.)

[90] According to the plaintiff, the impugned email was issued because of what took place in the Kulim Suit. He testified in the defamation suit that no one appeared for the defendant on 2 October 2017. But that is not correct. What actually happened is that Zamri from OHC appeared and made an oral application for OHC to be discharged. The session court directed Zamri to file a formal application, which he did. That application was allowed on 16 October 2017. As for 2 October 2017, Zamri (OHC) voluntarily abstained from participating in the trial. It was certainly not a case where the case proceeded by default.

[91] On the issue of damages, it is perhaps pertinent to refer to the plaintiff's answers to questions 37 and 39 of his witness statements where he said:

37. Question: Did the said impugned email caused any damage to your profession?

Answer: Yes, the said email had damaged my profession wherein as a practicing lawyer, people look down on my competency as a senior lawyer.

...

39. Question: Other than the damage to your reputation, did you suffer any other damage?

Answer: Yes, my firm and I suffered economic losses wherein my business was affected wherein after the publication of the said impugned email, my firm's business revenue had dropped and all insurance companies that I have applied for have refused to entertain my application. And further Tokio Marine Insurans with whom I have been on their panel of insurance for bodily injury work for more than 15 years have recently in November 2018, 'dropped' my firm from their panel as service providers.

D1'S TESTIMONY

[92] We turn now to D1's evidence. In her witness statement D1 explained how claims are processed:

7. Q: How does Allianz's Claims Division process a bodily Injury claim made by the Third Party?

A: (a) When a Third Party Bodily Injury ('TPBI') claim has been made, the Third Party Bodily Injury Unit ('TPBI Unit') of the Claims Division will first register the claim and confirm cover letter will be issued.

(b) The registered claim will then be assigned to a person in charge. For the avoidance of doubt, the person in charge would be a Claims Examiner.

(c) The Claims Examiner will assess the claim based on the available documents and make an evaluation.

(d) Upon evaluating the claim and in the event that there is a requirement for further investigation, the TPBI Unit will appoint an adjuster to which the adjuster will provide a report to the Claims Division.

(e) If the report submitted by the adjuster clarifies the doubts to the claim, Allianz will process the claim and attempt direct settlement. Once settlement has been reached, Allianz will make payment to the Third Party upon receipt of discharge voucher or consent judgment.

(f) Otherwise, the Claim Examiner will appoint a panel solicitor if a claim has been filed in Court and the Third Party's lawyer refuses to mention on behalf for Allianz.

8. Q: What are the steps taken by the TPBI Unit of the Claims Division when the adjuster's report confirms the doubts to the claim?

A: (a) If the report confirms the doubts to the claim either in liability or quantum, the Claims Examiner will still attempt settlement based on the findings of the adjusters.

(b) In the event a judgment has been recorded, the judgment sum will be paid to the Third Party or the Third Party's lawyer upon receipt of the approved draft judgment. I refer to the TPBI Manual & Guide 2017 at pages 222 and 225 of the Common Bundle of Documents ('CBOD').

9. Q: What is the usual practice taken by the TPBI Unit of the Claims Division if the claim is initiated by the Third Party's lawyer?

A: (a) In respect of motor claims made by Third Party ('the Claimant') against the Insured/Allianz, if direct settlement fails, it is the usual practice that the Claimant's solicitor will serve the requisite Notice under Section 96 of the Road Transport Act 1987 to Allianz to notify a claim has been made against Allianz arising from a insurance policy which has been issued in favour of Allianz's Insured (see TPBI Manual & Guide 2017 at page 210 of the CBOD).

(b) Once a claim has been filed at court by the Claimant, it is the usual practice that the Claimant's solicitor will serve a copy of the Writ and Statement of Claim to Allianz's Claims Division.

(c) Once the Writ and Statement of Claim have been served on Allianz and a mention date has been fixed, the TPBI Unit of the Claims Division will instruct its panel solicitor to appear for and on behalf of the Insured. This is where the Claimant's lawyer refuses to settle with us directly and require us to appoint lawyer.

10. Q: Does the appointed panel solicitor appear for and on behalf of the Insured throughout the course of proceedings until the full and final disposal of the suit?

A: Yes. However, if the claim is found to be a fraudulent claim or the Insured has breached any terms of the insurance policy, Allianz has a right to declare the policy null and void.

11. Q: What are the steps taken by Allianz if the claim is a fraudulent claim?

A: (a) The Claims Examiner will then make the following applications to the Court simultaneously:

(i) An Originating Summons filed in High Court to declare the policy issued to the Insured null and void;

(ii) Intervener application;

(iii) Application to stay the main suit.

(b) Once a High Court order to declare the policy null and void is secured, Allianz's panel solicitor will be instructed to discharge themselves as the solicitor for the Insured if a suit has already been filed at court.

[93] D1 explained why the impugned email was set out. She started by referring to the Georgetown Suit.

28. Q: Could you please explain to the Court why did you send the Impugned email?

A: The Impugned email was in response to what had transpired in Georgetown Magistrate Court Civil Suit No PA-A73KJ-513–06/2017 ('the Georgetown Suit').

29. Q: What had transpired in the Georgetown Suit?

A: (a) On 9.9.2016, the plaintiff served a Notice under Section 96(2) of the Road Transport Act 1987 ('Section 96(2) Notice') on Allianz in respect of an accident happened on 7.2.2016 involving Ravendran a/l Kalangiam ('the purported Victim') and Mohd Fadzli bin Mohd Salleh and Normah bt Hashim ('the Allianz's Insured') with vehicle No PHF 2940 which was insured by Allianz.

(b) In reply to the Section 96(2) Notice served by the Plaintiff, Allianz replied vide a letter dated 22.9.2016 requesting for documents to process the claim. Allianz also investigated the claim at the same time.

30. Q: Did the Plaintiff reply to the Allianz's letter dated 22.9.2016?

A: No

31. Q: What happened subsequently?

A: Despite the fact that we had requested the Plaintiff to refrain himself from filing any civil action against the Allianz's Insured until such time when negotiations for settlement has been exhausted, the Plaintiff proceeded to file the Georgetown Suit against the Allianz's Insured on 9.6.2017.

32. Q: Had the Writ and Statement of Claim been served on Allianz at the material time?

A: No After filing of the Georgetown Suit, the Plaintiff only served the Writ and Statement of Claim on the Allianz's Insured on 23.6.2017.

33. Q: Did Allianz appoint a panel solicitor to act for the Allianz's Insured in the Georgetown Suit?

A: No Since filing of the Georgetown Suit, Allianz was not being informed of the court proceedings and any information pertaining to the Georgetown Suit. Therefore, Allianz did not manage to instruct their panel solicitors to appear for and on behalf of the Allianz's Insured.

34. Q: What was the outcome for the Georgetown Suit?

A: (a) On 16.8.2017, the Plaintiff obtained a judgment in default against the Allianz's Insured In the Georgetown Suit ('Judgment in Default'). Allianz was, again not served the Judgment In Default at the material time.

(b) On 6.9.2017, the Plaintiff proceeded to assess the claim and obtained an assessment order ('Assessment Order') without Allianz's panel solicitors being appointed to represent Allianz's Insured. Allianz was again not served the Assessment Order at the material time.

(c) As can be seen from the Assessment Order at page 36 of the ABOD itself, the claim had been called for assessment on 22.8.2017 with the presence of the Plaintiff only.

35. Q: When was the first time Allianz became aware of the Georgetown Suit?

A: Allianz only knew about the Georgetown Suit when the Plaintiff served the Writ and Statement Of Claim, Judgment In Default and Assessment Order on Allianz by way of e-mail on or around 16.10.2017.

36. Q: What were the steps taken by Allianz after the aforesaid cause papers and Orders were served on Allianz on 16.10.2017?

A: (a) Upon receipt of the cause papers and Orders, we immediately appointed Messrs Zaid Ibrahim & Co to set aside the Judgment In Default and Assessment Order on 19.10.2017 ('the Setting Aside Application').

(b) The Setting Aside Application was based on among others the grounds that it was a fraudulent claim from an event which did not take place.

(c) On 26.10.2017, Messrs Zaid Ibrahim & Co obtained a stay order to stay the execution of the Judgment In Default and Assessment Order.

(d) Despite the interim stay order, the Plaintiff issued a letter dated 1.11.2017 to Allianz requesting for payment and in default threatening recovery proceedings and copied the said letter to Bank Negara.

37. Q: What was the outcome of the Setting Aside Application?

A: (a) We successfully set aside the Judgment in Default and Assessment Order on

16.11.2017 ('the Setting Aside Order'). A copy of the Setting Aside Order appears at pages 160 to 161 of the ABOD.

(b) The Plaintiff filed an appeal to the Penang High Court against the Setting Aside Order. A copy of the Plaintiff's Notice of Appeal appears at pages 162 to 166 of the ABOD.

(c) On 27.4.2018, the Plaintiff withdrew the Appeal against the Setting Aside Order.

38. Q: After the Judgment In Default and Assessment Order were set aside, did the Georgetown Suit proceed to trial?

A: No We found out the claim in the Georgetown Suit was a fraudulent claim. We subsequently managed to secure a High Court Order vide Kuala Lumpur High Court Originating Summons No: WA-24NCC- 557–12/2017 ('the Kuala Lumpur Suit') declaring the motor policy covering the Insured's vehicle as void and unenforceable on the ground that it was a fraudulent claim ('the Kuala Lumpur Declaratory Order').

39. Q: Did the purported Victim appeal against the Kuala Lumpur High Court Declaratory Order?

A: (a) Yes. The purported Victim appealed against the Order under Court of Appeal Appeal No W-02(NCC)(A)-554–03/2018.

(b) On 22.10.2018, the Court of Appeal dismissed the purported Victim's Appeal and affirmed the Kuala Lumpur High Court Declaratory Order. I refer to the Court of Appeal Order dated 22.10.2018 at pages 1 to 3 of the 3rd Additional Common Agreed Bundle of Documents ('ABOD(3)').

(c) To assist this Honourable Court in determining the Georgetown Suit and the Kuala Lumpur Suit as aforesaid, I have prepared a map of chronology of events which I annexed in this Witness Statement as Annexure 'A' for this Honourable Court's perusal.

40. Q: What were the precaution steps taken by you in view of the events transpired as aforementioned?

A: With an honest believe of what had in fact transpired in the Georgetown Suit, as the Senior Claims Manager, I sent the impugned email to the 27 recipients who are the panel solicitors in the North of Malaysia and copied to Claims Examiners and supporting staff in the TPBI Unit of the Claims Division.

41. Q: What was your purpose in issuing the impugned email?

A: (a) In view and with an honest believe of the events transpired in the Georgetown Suit as aforesaid, I issued the impugned email informing the panel solicitors of the Northern Region that it has come to Allianz' attention that the Firm Subramaniam & Shafiq is assessing claims without the Allianz's panel solicitors being appointed.

(b) The purpose of the impugned email is also to authorise the panel solicitors of the Northern Region to enter appearance for and on behalf of Allianz's Insured in the event they came across such situation in Court to prevent any judgment in default

or assessment order from being entered against the unrepresented insured when Allianz is the Insurer on record.

(c) It gives the panel solicitors the authority to enter appearance for and on behalf of the Allianz's Insured without first procuring the written consent and authority of Allianz's TPBI Unit and/or Claims Examiners.

(d) The whole purpose in issuing the impugned email is to prevent judgment in default or assessment order from being entered against Allianz.

(e) I honestly believe that I as the Senior Claims Manager have a legitimate interest to issue the impugned email and I am legally and contractually bound to prevent any such similar recurrence.

42. Q: Why did you say so?

A: (a) As stated earlier, under my job descriptions together with the guideline and policies of Allianz, I am obliged to act in the best interest of Allianz and to settle claims in accordance to Allianz's policies and guidelines and to improve and review claim processes as and when it is necessary.

(b) It is the Allianz's policy that no judgment in default could be entered against Allianz.

(c) This could be seen from among other the instructions given by the second Defendant, Mr Jayapragash as the Head of Claims Division on 31.1.2013 in which he had clearly directed that 'let's work together to ensure that JIDs, recoveries are minimised. AGIC has a zero tolerance level for JIDs'.

(d) As such, giving the events transpired in Georgetown Suit, I am legally and contractually bound to review and/or improve the claim process by giving the panel solicitors the authority to enter appearance for and on behalf of Allianz's Insured in such a situation even without Allianz's prior authorisation and/or appointment to ensure that there is no judgment in default entered against Allianz.

43. Q: Why did you send the impugned email to these limited number of panel solicitors?

A: (a) These solicitors are Allianz's panel solicitors in Northern Region. I refer to the Service Agreement With Third Party Bodily Injury Claims Panel solicitors ('the Service Agreement') executed between the panel solicitors and Allianz at pages 77 to 135 of the CBOD.

(b) It is the usual practice that Claims Examiners will appoint panel solicitors according to the state where the summons is filed (TPBI Manual & Guide 2017, page 246 of the CBOD).

(c) Since the events / Georgetown Suit happened in Penang, the email was sent to the panel solicitors in Northern Region authorising them to enter appearance for and on behalf of the Allianz's Insured if they come across such similar situation in the Penang's jurisdiction.

(d) By virtue of their responsibilities under the Service Agreement, they have a legitimate interest in receiving and seeing the Impugned email.

(e) They are legally and contractually bound to act in the best interests of Allianz and to assist Allianz in preventing such similar recurrence.

(f) In any event, I believe that the communications between the panel solicitors and Allianz are privileged. The following panel solicitors of Allianz will be giving evidence on this issue:

(i) Suresh Andrew;

(ii) Suresh G Sreedharan;

(iii) Zamri Ali Hassan;

(iv) Kantavil Karapiah;

(v) Anita Kaur; and

(vi) Lim Wen Jack.

44. Q: Why did you send the impugned email to these limited number of Claims Examiners?

A: (a) As stated above, Claims Examiners are in charge of the appointment and responsible for liaising with Allianz's panel solicitors whenever a claim arises.

(b) Therefore, when the panel solicitors are given a blanket authority to enter appearance for and on behalf of Allianz, Claims Examiners are under obligations and duties to fully aware the arrangement on the appointment of panel solicitors

(c) By virtue of their responsibilities under the Job Descriptions at pages 156 to 190 and TPBI Manual and Guide 2017 at pages 207 to 266 of the CBOD, they have a legitimate interest in receiving and seeing the impugned email.

(d) They are legally and contractually bound to act in the best interests of Allianz and to prevent any such similar recurrence.

45. Q: Why did you send the impugned email to these limited number of senior clerks and/or clerks?

A: (a) In respect of the senior clerks and/or clerks, their duties are among other to:

(i) assist me and Claims Examiners in the support services required within the unit such as registration of claims, to alert the Claims Examiners if there is a need to appoint lawyers and adjusters;

(ii) comply with regulatory and internal guidelines; and

(iii) comply with best practices of the Claims Division as issued by any senior staff and other duties as assigned by the Head of Claims Division and/or Head of Unit.

Sufaizah bt Abd Shukor will be giving evidence on this.

(b) By virtue of job descriptions of senior clerks and/or clerks at pages 192 to 197 of the CBOD and TPBI Manual and Guide 2017 at pages 207 to 266 of the CBOD, they have a legitimate interest in receiving and seeing the impugned email.

(c) They are legally and contractually bound to act in the best interests of Allianz and to prevent any such similar recurrence.

46. Q: Why did you send the impugned email to this particular personal assistant, Miss Nor Azuah Bt Omar?

A: (a) Miss Nor Azuah bt Omar was Mr Jayapragrash personal assistant at the material time.

(b) Her duties were among other to assist Mr Jayapragrash who was the Head of Claims Division in all secretarial functions including alerting Mr Jayapragrash of any important information and matters that arise in the Claims Division as and when deemed necessary. Sufaizah bt Abd Shukor will be giving evidence on this.

(c) By virtue of her job descriptions at page 191 of the CBOD, she has a legitimate interest in receiving and seeing the impugned email.

(d) She is also legally and contractually bound to act in the best interests of Allianz.

ZAMRI'S TESTIMONY

[94] This is what Zamri said vis a vis the Kulim Suit:

3. Q: What took *place* on the trial date?

A: *I attended the Kulim Session Court on 2.10.2017 which was on the day of the trial and when the matter was called up before the Learned Session Court Judge. I explained that the 3rd Defendant had secured the Alor Setar Declaratory Order and I was instructed to discharge myself.*

Since I had yet to file the Discharge Application, Learned Session Court Judge could not grant such an order and instructed me to file a formal application.

4. Q: Did you file a Discharge Application as instructed by the Learned Session Court Judge?

....

A: The Discharge Application was filed on the 8.10.2017 and was fixed on 16.10.2017 to which Messrs Othman Hashim & Co secured an order discharging as solicitors for the insured defendant in the Kulim Suit.

18. Q: How did the court proceedings proceed in the Kulim Suit while pending the setting aside of the Alor Setar Declaratory Order In the Penang Suit?

A: (a) in light of the Alor Setar Declaratory Order, we were instructed by Allianz to discharge ourselves as the solicitors for the Allianz's Insured in the Kulim Suit.

(b) The Kulim Suit proceeded to trial on 2.10.2017.

(c) On the trial day itself, I attended to the Kulim Sessions Court informing the Court about the grant of the Alor Setar Declaratory Order and Allianz's instructions to discharge ourselves as the solicitors for the Allianz's Insured in the Kulim Suit.

(d) *I then left the court proceedings after informing the Kulim Sessions Court about the*

Alor Setar Declaratory Order and the aforesaid instructions.

HIGH COURT

[95] At para [65], the JC ruled that the impugned email was not referring to the Georgetown Suit. The JC said:

Findings of the court

[65] This court *agrees with the learned plaintiff's counsel that the impugned email was not referring to the Georgetown Suit*. Therefore, the defence of qualified privilege in relation to the Georgetown Magistrates' Suit cannot be true nor relied upon.

[96] However, somewhat contradictorily, the JC said at [81] that the impugned email 'clearly refers to the case in Georgetown Suit Magistrate Court'. Paragraph [81] reads as follows:

[81] During the trial, the defendants said that it referred to the case in the Kulim Sessions Court and now say the opposite in their arguments. *This court finds*, based on the evidence, that *it clearly refers to the case in Georgetown Magistrate Court,* and the defendant's actions now are an afterthought simply to negate the facts and testimony of the defendant's own witnesses. Notwithstanding the defendants' claims that they are acting in a professional capacity and have no malicious intent, this court continues to question why the email must be highlighted specifically to the plaintiff and what specific instructions must be followed by the defendants' panel solicitors *A reasonable man would certainly point out that the plaintiff must have committed misconduct to the extent that it is best to ask with the court interpreter in open court. The instructions are also clear, based on the defendants' pretence that the plaintiff is a lawyer who will assess the damages on behalf of D3 even without the presence of a solicitor. A reasonable man cannot infer any other meaning from the email*. (Emphasis added.)

OUR ANALYSIS

[97] Obviously, the critical document which lies at the epicentre of the appeals is the impugned email. The primary question is whether the words appearing in the impugned email are capable of bearing the defamatory meanings as pleaded by the plaintiff in his statement of claim and as elaborated in his witness statement, and whether, they are in fact defamatory of the plaintiff. In this context, we take the view that, the gravamen of the plaintiff's case in defamation is to be gleaned from his answer given during cross-examination where he was asked whether there were any offensive words against him and he said, 'But, it's liable [sic] in the sense I'm assessing claims without lawyers being appointed'.

[98] In this context, it is instructive to refer to the Court of Appeals' decision in *Allied Physics Sdn Bhd v Ketua Audit Negara (Malaysia) & Anor and other*

appeals [2016] 5 MLJ 113 (CA), where Vernon Ong, JCA (later FCJ) said:

> [26] In this instance it is not really disputed that the impugned words in question refer to the plaintiff and that they were published. Accordingly, we will consider the question of whether the impugned words are defamatory.
>
> [27] In this process, the first step is for the court to *determine whether the words complained of are capable of bearing a defamatory meaning*.
>
> [28] As a starting point, it is also instructive to refer to the three formulae set out in *Gatley on Libel and Slander* (12th Ed) at p 7 as follows:
>
> (a) would the imputation tend to lower the plaintiff in the estimation of right-thinking members of society generally?
>
> (b) would the imputation tend to cause others to shun or avoid the claimant? and
>
> (c) would the words tend to expose the claimant to 'hatred, contempt or ridicule?
>
> ...
>
> [31] Accordingly, *the words are to be taken in the sense that it is most natural and obvious. The ordinary and natural meaning of words may be either the literal meaning or it may be implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning capable of being detected in the language used can be part of the ordinary and natural meaning of words* (see *Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words.
>
> [32] It is equally important to note that *the context and circumstances of the publication must be taken into consideration, not only the actual words used* (*Keluarga Communication v Normala Samsudin* [2006] 2 MLJ 700 (CA) at p 708).

[99] In *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 at p 58; [1973] CLJU 146; [1973] 1 LNS 146, the High Court said:

> Thus, the test of defamatory nature of a statement is its *tendency to excite against the plaintiff the adverse opinion of others*, although no one believes the statement to be true. Another test is: would the words *tend to lower the plaintiff in the estimation of right-thinking members of society generally?* The typical type of defamation is an attack upon the moral character of the plaintiff attributing *crime, dishonesty, untruthfulness, ingratitude* or cruelty.

[100] In *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at p 374; [1999] 1 CLJ 461 at p 467 the Court of Appeal said:

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any *dishonourable or discreditable conduct* or motives or a *lack of integrity* on his part? If the question invites an affirmative response, then the words complained of are defamatory.

[101] In *Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya'kub* [2005] 3 MLJ 485; [2005] 2 CLJ 645, the Court of Appeal at p 490 (MLJ); at p 651 (CLJ) said:

> [10] In coming to his findings we are of the opinion that the learned judge had adopted the correct test ie, *whether the words complained of were calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally*.

[102] In the case of *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor* [2021] 2 MLJ 577; [2021] 4 CLJ 327, the Federal Court considered the test for determining whether a statement spoken is defamatory. In so doing, Harmindar Singh Dhaliwal FCJ, in delivering the judgment of the court, held as follows:

> [19] The law in respect of what amounts to defamatory matter is well- settled. An imputation would be defamatory if its effect is to expose the plaintiff, in the eyes of the community, to hatred, ridicule or contempt or to lower him or her in their estimation or to cause him or her to be shunned and avoided by them ...

[103] Based on the several established case law authorities referred to by the parties, the following appear to be the guiding principles in determining whether the words appearing in the impugned email are capable of bearing a defamatory meaning, and whether they are in fact defamatory of the plaintiff?

(a) the words are to be taken in the sense that is most natural and obvious;

(b) the ordinary and natural meaning of words may be either the literal meaning or it may be implied or inferred or an indirect meaning;

(c) the context and circumstances of the publication must be taken into consideration, not only the actual words used;

(d) the court should rule out any meaning which, 'can only emerge as the product of some strained, or forced, or utterly unreasonable interpretation;

(e) the governing principle is reasonableness;

(f) the hypothetical reasonable reader is not naive, but he is not unduly suspicious;

(g) he can read between the lines;

(h) he can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available; and

(i) the test is an objective one and it is whether, under the circumstances in which the words were published, reasonable men to whom the publication was made, would be likely to understand it in a defamatory or libellous sense.

[104] Thus, the question as to whether the words contained in the impugned email are defamatory is to be resolved by asking whether the words: (a) tends to lower the plaintiff in the estimation of right-thinking members of society generally; (b) cause the plaintiff to be shunned or avoided; (c) exposes the plaintiff to hatred, contempt or ridicule; or (d) imputes to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part.

[105] During the trial, Anita, Lim and Zamri testified on behalf of the defendants. The plaintiff's cross-examination of these witnesses was designed to extract their response to the impugned email and as to how they complied with D1's instructions when they came across a situation where they saw the plaintiff in court and proceeding with matters in the absence of the solicitor for the insured/defendant. These witnesses who were all litigation lawyers who regularly handled running down matters for insurance clients, testified that what they did was to ascertain in which-ever way possible, whether the matters in court where the plaintiff was handling (without the other side being represented) involved D3's insured, and if so, to take steps to protect D3's interests by going on record and taking another date etc.

[106] What is significant about the cross-examination of these witnesses by the plaintiff is what the plaintiff did not ask. It is curious that he did not ask these witnesses whether they understood the impugned email in a defamatory or libellous sense as per the meanings which he had pleaded in the statement of claim and per his witness statement.

[107] Although the case laws speak of the ordinary reasonable hypothetical reader, here is a case where the actual recipients (*Anita, Lim and Zamri — who were practicing lawyers*) testified, and yet it was not put to them that the impugned email was defamatory of the plaintiff in the sense as pleaded in the statement of claim and as elaborated in the plaintiff's witness statement.

[108] Of course, it is trite that the construction of the document and the interpretation of the words contained therein ie as to whether they are capable of bearing a defamatory meaning and whether they were in fact defamatory of the plaintiff is a question of law for the court to decide. But it is very telling that the plaintiff avoided asking Anita, Lim and Zamri the most obvious question when they were in the witness box.

[109] Now, the JC concluded that the plaintiff was defamed because these witnesses had testified that they implemented D1's directive and took steps in court when they saw the plaintiff acting in matters where the other side was not represented. The JC's conclusion in this regard can be gleaned from para [81] of the grounds of judgment which reads:

> [81] During the trial, the defendants said that it referred to the case in the Kulim Sessions Court and now say the opposite in their arguments. This court finds, based on the evidence, that *it clearly refers to the case in Georgetown Magistrate Court*, and the defendant's actions now are an afterthought simply to negate the facts and testimony of the defendant's own witnesses. notwithstanding the defendants' claims that they are acting in a professional capacity and have no malicious intent, this court continues to question why the email must be highlighted specifically to the plaintiff and what specific instructions must be followed by the defendants' panel solicitors
>
> *A reasonable man would certainly point out that the plaintiff must have committed misconduct to the extent that it is best to ask with the court interpreter in open court. The instructions are also clear, based on the defendants' pretence that the plaintiff is a lawyer who will assess the damages on behalf of D3 even without the presence of a solicitor. A reasonable man cannot infer any other meaning from the email.*

[110] In our view, the mere fact that these witnesses had implemented D1's directive does not mean that the plaintiff has been defamed. There is no suggestion or evidence that these witnesses had spoken to the court interpreter and conveyed the contents of the email to the interpreter or had informed the interpreter that the plaintiff had committed misconduct. What they did was to ask the interpreter whether they could see the court file to check if the insurance particulars were in the file.

[111] At the very least D3's solicitors needed to know the vehicle registration number so as to ascertain whether it involved D3's insured. Zamri testified that even if the insurance details were not in the file, all he needed was to get the vehicle registration number and he would then contact D3's claims department to check from their system whether there was a match. Anita said that if need be, she would even speak to the plaintiff to get his confirmation whether the case involved D3's insured. Clearly, these were acts done by D3's panel lawyers pursuant to D'1's instructions per the impugned email to protect D3's interest.

[112] Now the critical question is — why was the impugned email issued? What was the context and the circumstances which gave rise to the issuance of the impugned email?

[113] The plaintiff said that it was issued by D1 in retaliation for the debacle in the Kulim Suit where he had obtained judgment on 1 November 2017, for RM512,669.16 (*excluding interest and costs of RM44,520*) against D3's insured, which he was seeking to enforce against D3, by way of recovery action and winding up, if necessary and where D3 discovered much to their horror, that they were not exempt from liability because the declaration obtained previously pursuant to an order of the Alor Setar High Court dated 9 March 2016 (amended later — 28 January 2018) under s 96(3) of the RTA for the Kulim Suit was woefully and fundamentally defective as it referred to the wrong policy cover note and wrong policy period. The other problem with the declaration is that OS 797 was not served on the plaintiff, or his client in the Kulim Suit.

[114] Hence, the plaintiff claimed that the defendants acted maliciously when the outcome of the Kulim Suit was adverse to them due to their own 'blunder' which led to the plaintiff taking the stance that he would enforce and/or execute the judgment obtained in that suit.

[115] On the other hand, the defendants contended that the impugned email had nothing to do with the Kulim Suit and had everything to do with the Georgetown Suit, where the plaintiff had only served the statutory notice under s 96(2) of the RTA but thereafter did not serve the writ on D3 and served the cause papers directly on D3's insured and then took judgment in default (JID) on liability, and thereafter went on to assess damages without notifying D3. Later that judgment was set aside.

[116] The JC seemed to have reached contradictory conclusions on the issue as whether the impugned email was issued due to the Georgetown Suit or the Kulim Suit.

[117] At any rate, it is not in dispute that on or about 12 December 2017, D3 filed an application in the High Court in Kuala Lumpur via Originating Summons No WA-24NCC-557–12 of 2017 ('OS 557') for a declaration that the motor vehicle policy for motorcycle No PHF 2940 was null and void and unenforceable vis a vis the purported accident on 7 February 2016 involving motorcycle No PLS 4299 and the insured motorcycle. During cross-examination, the plaintiff agreed that he was served with a copy of OS 557 in the middle of December 2017. The significance of this date is that OS 557 is in relation to and connected with the events that transpired in the Georgetown Suit.

[118] Hence, as at the date of the impugned email related to the Georgetown Suit was still a 'live' issue. Hence, there is in our view, a background and context for the issuance of the impugned email. For completeness, it is necessary to mention that on 23 February 2018, the High Court allowed the application via OS 557. The plaintiff's client appealed to the Court of Appeal via Court of Appeal Civil Appeal No W-02(NCC)(A)-554–03 of 2018. The appeal was dismissed on 22 October 2018.

[119] No doubt, around the time that the impugned email was issued, the Kulim Suit was also being dealt with as the plaintiff was threatening to execute on the judgment dated 1 November 2017. The plaintiff's contention is that the impugned email was due to his threat to commence execution on the judgment in the Kulim Suit. Sufaizah bt Abdul Shukor (SD1) (Claims Examiner — later Claims Manager) explained that the impugned email was issued because of what had taken place in the Georgetown Suit. SD1 was a recipient of the impugned email. D1 also explained at length that the impugned email was issued so as to avoid the type of situation that occurred in the Georgetown Suit.

[120] According to D1 the email was a manifestation of pro-active risk management on her part. Her superior, D2 was in the loop, although he testified that it was not proper to have named the plaintiff in the email. D2 agreed during cross-examination that he did not veto D1's action in issuing the impugned email.

[121] And it is of critical importance that D1's employer D3 took no action against her for issuing the impugned email. It is important to mention that although D2 had stated during his oral testimony that the impugned email should not have mentioned the plaintiff's name, D2 did nevertheless agree that he did not object to the email at the time when it was issued. Indeed, there is absolutely no evidence or any suggestion that D3 has distanced itself from D1's conduct.

[122] In fact, by their defence, the defendants (and each of them) have taken a common stand, ie that the words appearing in the impugned email in the natural and/or ordinary meaning are not defamatory of the plaintiff and that if defamatory, the words were true or substantially true (s 8 of the Defamation Act 1959) or alternatively, that the impugned email was published on an occasion of qualified privilege in the sense that D1 was under a duty to carry out a risk management to avoid the situation that occurred in the Georgetown Suit and thereby protecting D3's interests.

[123] Hence, it is safe to assume that D2 and D3 have condoned the issuance of the impugned email. We do not see why D2 had to be sued as he was

only D1's superior. Hence, if indeed D1 had defamed the plaintiff then it is D3 the employer who will be vicariously liable for the tort of defamation. D2 was just a passive recipient of the impugned email who may have at best, tacitly condoned D1's actions. We think that it is misplaced for the plaintiff to have included D2 as a party the suit. It is possible that D2 was (improperly) included for harassment value. At any rate, the question ultimately is whether the impugned email is defamatory of the plaintiff.

[124] Before we close off this point, we think that it is necessary to examine the Kulim Suit a little further. The plaintiff contended that the impugned email was issued on 15 December 2017 because a day earlier he had threatened to commence execution proceedings against D3 based on the judgment dated 1 November 2017 in the Kulim Suit.

[125] In so far as the impugned email is concerned, the only words that could remotely be construed as being defamatory are the following — '... the above lawyer is assessing claims without the defendant lawyers appointed ...'.

[126] It is relevant to ask — *did the plaintiff go ahead with the Kulim Suit without the defendant's lawyers being appointed*? Now, in the Kulim Suit D3's insured and the driver were represented by OHC and the lawyer in charge was Zamri. He was in court on the day of the trial on 2 October 2017 and made an oral application for OHC to be discharged. He was asked to put in a formal application. On 2 October 2017 the plaintiff went on with the case without the participation of OHC/Zamri. On 16 October 2017 (*after the trial had concluded but before the decision was given*) OHC was discharged. Thereafter, the sessions court delivered judgment on 1 November 2017.

[127] Hence, on 2 October 2017, OHC was still on record and Zamri was in fact in court except that he chose not to participate in the trial. As such, contrary to the plaintiff's contention, for the Kulim Suit, there is no question of judgment being taken by default or assessment of damages without the presence of the lawyers for the insurers because as at 2 October 2017, that is when the trial went on, OHC were still on record, except that they voluntarily opted not to participate in the trial.

[128] Obviously OHC and by extension D3, thought that D3 was in an iron-clad position because of the s 96(3) of the RTA declaration obtained on 9 March 2016 in Alor Setar High Court Originating Summons No 24NCVC-797–11 of 2015 ('OS 797'), which was subsequently discovered to be fatally flawed. Hence, OHC took the bold step of staying out of the trial on 2 October 2017 and they were unperturbed that judgment on liability and quantum would be entered against D3's insured and driver.

[129] However, everything backfired when the plaintiff pointed out to D3 that the declaration in OS 797 was useless and did not exempt them from liability. D3 subsequently amended the order granted in OS 797 on 28 January 2018, but it was too late because judgment had already been granted on 1 November 2017. Obviously, the amended order had no retrospective effect.

[130] Back to the critical question — was the impugned email is causally connected to the Kulim Suit or to put it in the plaintiff's words, was it issued in retaliation for the debacle that took place vis a vis the Kulim Suit and the declaratory order in OS 797? It is clear that the JC could not make up his mind one way or the other, whether the impugned email was connected to the Georgetown Suit.

[131] As far as we are concerned, we do not see any connection whatsoever between the impugned email and the Kulim Suit. We agree with the submissions that were made by counsel for the defendants — that the impugned email has no connection with the Kulim Suit and is totally aligned with the events that transpired in the Georgetown Suit. Looking at all the events that had taken place, it is clear that the impugned email was issued as part of D3's risk management action so that if D3's panel lawyers see the plaintiff going ahead with assessment without the other side being represented, then they are to check if it involved D3's insured. This is particularly necessary because the plaintiff, to put in the context of section 4.15 of the TPBI manual, has the tendency to serve directly on the insured. Hence the impugned email was in line with D3's instructions to their panel lawyers to protect their interests.

[132] Thus, we find it rather puzzling that at para [65] of the grounds of judgment the learned judicial commissioner had concluded that 'the impugned email was not referring to the Georgetown Suit' and yet at para [81] he said, '... based on the evidence, that it clearly refers to the case in Georgetown Magistrate Court ...'.

[133] Looking at all the events that took place in the Kulim Suit and in the Georgetown Suit, it is clear that the impugned email, was issued, as stated by SD2 and by D1, due to the events that took place in the Georgetown Suit and as part of pro-active risk management to protect D3's interest as the paymaster of any judgment that is obtained against their insured.

[134] It has not escaped our attention that on 26 October 2017 ZICO applied to set aside the judgment that was obtained by default in the Georgetown Suit and they also obtained an ex parte interim stay of proceeding order and informed the plaintiff on the same day. However, despite the interim stay order, on 1 November 2017, the plaintiff sought payment from D3.

[135] Looking at the plaintiff's propensity in attempting or threatening execution proceedings despite the insurer having obtained a stay of execution/proceedings, it comes as no surprise that the plaintiff was singled out and D3 had to take appropriate action to avoid a repetition of what had taken place in the Georgetown Suit.

[136] Next, in so far as defamatory imputation is concerned, which can only be a reference to the words, '… the above lawyer is assessing claims without the defendant lawyers appointed …' , it is to be noted that at [81] of the grounds of judgment the JC said that '… A reasonable man would certainly point out that the plaintiff must have committed misconduct to the extent that it is best to ask with the court interpreter in open court …'. We do not agree with the JC's conclusion in this regard. Such a conclusion is in our view, the product of a 'strained, or forced, or utterly unreasonable interpretation'. We do not see how the words which convey that the plaintiff is assessing claims without the presence of the lawyers who would have been appointed by the insurer had materially injured the plaintiff's reputation as a lawyer and D3's claims examiners would only construe the words to have the meaning as provided for in para 4.1 of the TPBI Manual that the plaintiff has a tendency to serve the cause papers directly on the insured.

[137] In our view, if the JC had appreciated the practice of running-down cases and properly applied the legal principles alluded to earlier, then he would have reached the reasonable conclusion that the words appearing in the impugned email are not defamatory of the plaintiff as they merely conveyed the impression that the plaintiff is someone who has the tendency to serve the papers on the insured and proceeds to assess damages without notifying the insurer which is exactly the situation that occurred in the Georgetown Suit and which is totally envisaged by para 4.1 of the TPBI Manual.

[138] And it is significant that during the trial the plaintiff made it absolutely clear in his testimony that in law (*Road Transport Act 1987 or the Rules of Court 2012*) he was not obliged to serve the cause papers on the insurer and was entitled to serve it on the insured and obtain judgment in default on liability, and was thereafter not obliged to inform the insurer that liability had been entered by default against the insured and that he would be proceeding to assess damages.

[139] It was agreed by all sides that service on the insurer is only a practice and not a legal obligation. Hence, any judgment in default obtained against the insured in those circumstances, is a regular judgment (O 13 r 2 of the Rules of Court 2012).

[140] Indeed, it is clear from the plaintiff's own evidence that justification

(within the meaning of s 8 of the Defamation Act 1957) was established because the plaintiff did take judgment in default against the insured in the Georgetown Suit and went on with assessment also by default as there were no lawyers who acted for the insured. This happened because the plaintiff deliberately chosen not to serve any cause papers on the insurer (D3). Section 8 reads as follows:

> In an action for libel or slander in respect of words containing two or more distinct charges against the Plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the Plaintiff's reputation having regard to the truth of the remaining charges.

[141] In *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187; [2015] 8 CLJ 477 (FC), the Federal Court held:

> [58] A defendant will have sufficiently proven the defence of justification if he is able to prove the truth or the substantial truth of his own meanings of the impugned words (see *Moore v News of the World Ltd* [1972] 1 All ER 915 and *Khalid Yusoff v Pertubuhan Berita Nasional Malaysia (Bernama) & Ors* [2014] 8 CLJ 337, *Cheah Cheng Hoc & Ors v Liew Yew Tiam & Ors (No 2)* [2000] 6 MLJ 204; [2000] 5 CLJ 475).

[142] In *Raja Syahrir bin Abu Bakar & Anor v Manjeet Singh Dhillon and other appeals* [2020] 3 MLJ 482; [2019] 4 CLJ 301 (CA) the Court of Appeal held:

> [54] ... a defendant who is unable to prove the truth of all the material statements in the alleged libel may nevertheless succeed in the defence of justification where the defendant can show that *the words not proved to be true or truthful do not materially injure the plaintiff's reputation*. It is the truth of the imputations of the overall statement and not the truth of every word that is material ...

[143] In our view, the truth of the (*allegedly*) offending words in the impugned email, even if they are defamatory, have been substantially proven. In this regard, it is relevant to quote the Court of Appeal's decision in *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242 (CA) which held as follows:

> [24] ... In relying on the defence of justification the burden of proof is on the defendant to prove that the allegations made are true or substantially true ...

[144] It is clear from the evidence that the impugned email was necessitated by the events that transpired in the Georgetown Suit. Given that under s 96(1) of the RTA, D3 as the insurer of their insured motor vehicles are liable to satisfy any judgment that is obtained against their insured, we see nothing improper or mischievous or malicious on their part in taking pro-active risk management

steps via the impugned email to avert the recurrence of similar situations and to that end to alert their panel solicitors to ascertain if their insured vehicle is involved in the event they see the plaintiff in court and proceeding with the case (*whether on liability or assessment of damages — quantum*) without the solicitors for the other side being present. The fact that the plaintiff was singled out for mention in the impugned email does not mean that the words are defamatory. What is important is whether what was conveyed can reasonably be construed in a libellous sense. We do not think so.

[145] The JC said that the conduct of the panel lawyers in checking with interpreter, suggests that the plaintiff had committed 'misconduct'. We disagree. It is necessary to keep in mind that the panel lawyers, eg Anita, Lim and Zamri were merely seeking to ascertain whether the case which the plaintiff was handling involved D3's insured motor vehicle. Of course, whether they are able to get the requisite information from the court file is another thing. Here, the persons who checked with the interpreter are no ordinary persons and are in fact lawyers who act for insurance companies, and if they came across the plaintiff carrying on with his case without any solicitor for the other side being present, then, they being in the same line of work would know, as persons who regularly handle this type of litigation, that the plaintiff had probably not served the cause papers on the insurer and was going ahead to enter judgment against the insured.

[146] In our view, it is inconceivable that the lawyers eg Anita, Lim and Zamri would understand the impugned email in a libellous sense. This is because there was nothing inherently sinister in the text of the impugned email and all that it conveyed or implies is that the only notice that would have been given to the insurer is the notice under s 96(2) of the RTA and that the plaintiff had a tendency to serve the cause papers directly on the insured without giving any specific notification to the insurer that a suit had been filed and was about to proceed in the absence of the insurer's lawyers.

[147] By checking and taking steps to go on record for and on behalf of D3 (assuming the case involved D3's insured vehicle) all that these solicitors (viz Anita, Lim and Zamri) were doing was to ensure that D3's rights and interests are protected and preserved. In our view, the actions taken by the solicitors, ie Anita, Lim and Zari pursuant to the impugned email are indeed pro-active risk management steps to ensure that D3, as a regulated financial institution is not financially or reputationally prejudiced by the absence of solicitors representing their insured. To be clear, these lawyers would intervene and try to go on record on behalf of D3's insured, not because the plaintiff was committing misconduct or acting contrary to the provisions of the RTA or the Rules of Court 2012 but because of the plaintiff's tendency to go ahead with assessment

of damages without informing D3 that JID had been entered against their insured.

[148] For completeness, we add that apart from the defence of justification we also hold in the alternative that even if the impugned email is defamatory of the plaintiff, the defence of qualified privilege succeeds in this case as D1 (as Senior Claims Manager) had a duty to inform D3's claims examiners and D3's panel solicitors from the Northern region (*who are likely to be in the same court as the plaintiff*) to take steps to protect D3's interest in the event they came across the plaintiff proceeding without the solicitor for the insured.

[149] First, we refer to the following passage from *Gatley on Libel and Slander* (11th Ed) (at p 505 — para 1466) which states:

> It is a general rule that the defendant should be careful to make his *communication only to those persons who have a legitimate interest or duty in relation to the subject matter … However, if strict reciprocity were essential, society and its business could not be conducted, as others without a direct interest in the communication are regularly employed in helping to make the communication and it would be impossible to communicate if every defamatory communication had to be confined to those with a direct duty or interest in relation to its subject-matter*. For these reasons, communications to persons without such an interest or duty are nevertheless privileged if they are published reasonably, in the ordinary course of business, and no more widely than is required for the effective making of the communication, and if they would be privileged but for such incidental publication.

[150] In *Dr Chong Eng Leong v Tan Sri Harris bin Mohd Salleh* [2017] 4 MLJ 611 (CA), the Court of Appeal had discussed the defence of qualified privilege and enunciated as follows:

> [55] Now, what is qualified privilege as a defence in a defamation suit? Essentially, it is a defence that is available to a defendant whereby the *defendant as the person communicating the defamatory statement usually has a legal, moral or social duty to make it and the recipient has a corresponding interest in receiving it*.
>
> [56] Whether an impugned statement qualify for protection under this defence of qualified privilege would depend on the surrounding circumstances of the particular case. *The essential elements that must how ever be present are a duty on the part of the defendant to state it and the corresponding duty on the part of the public to whom it w as communicated via the publication, to receive it*. (Emphasis added.)

[151] And in *Mkini Dotcom Sdn Bhd & Ors v Raub Australian Gold Mining Sdn Bhd* [2021] 5 MLJ 79 (FC) the Federal Court emphasised that a defendant relying on the defence of qualified privilege must establish that there is a reciprocity between the publisher of the words complained of and the recipients. In so far as the circulation of the impugned email internally to D3's claims examiners is concerned, we think that it is relevant for us to refer to the

decision of the High Court in *Dato' Saizo Abdul Ghani v Celcom (M) Bhd & Anor* [2008] 2 MLJ 931; [2008] 10 CLJ 169 (HC) where the impugned letter in that case was circulated to officers of the first defendant. The defamation suit was struck out as the learned judge of the High Court (Justice Tengku Maimun bt Tuan Mat — later CJ) held that the communication (internally) was covered by privilege. The following passage from the judgment of the High Court is relevant:

> [10] The plaintiff the alleged that the letters from the defendants dated 21 November 2005 and 27 December 2005 (the said letters) are defamatory of the plaintiff.
>
> [11] Learned counsel for the defendant in his written submission argued, inter alia, that the plaintiff's claim discloses no reasonable cause of action as the particulars of the documents that are purportedly defamatory are not pleaded. Further learned counsel argued that there is no publication of the said letters as *the said letters were merely copied to the officers of the first defendant who had a corresponding interest or duty to be informed of the said letters. Learned counsel therefore contended that the defendants are protected by the defence of qualified privilege*. In support thereof learned counsel cited the case of *Reynolds v Times Newspapers Ltd and Others* [1999] 3 WLR 1010 wherein at p 1050 Lord Hope of Craighead said:
>
> > At the heart of the matter is the question whether 'the occasion' is privileged. This occurs where the person who makes the communication has an interest or duty to make it to the person to whom it was made, and the person to whom it is made has a corresponding interest or duty to receive it'
>
> [12] Learned counsel for the plaintiff in submitting that this is not a proper case to be dealt with under O 18 r 19 argued, inter alia, that publication had in fact been made to a third party ie, one Abdul Ghani bin Abdul Razak. It is important to note that this fact has not been pleaded by the plaintiff and hence I do not think it is open for the learned counsel to submit on the alleged publication to Abdul Ghani bin Abdul Razak. In any event Abdul Ghani had attended a briefing on behalf of the plaintiff on 15 June 2005 and the letter dated 21 November 2005 was addressed as folows:
>
> > En Abdul Ghani Abdul Razak
> >
> > Airtime Telecommunications
> >
> > Lot 1499-a, Jalan Long Yunus
> >
> > 15200 Kota Bharu
> >
> > Kelantan
>
> [13] Undeniably this letter was sent to the plaintiff and clearly it could not be said that there has been publication to third party. *There is also no doubt that based on Reynolds the defendants are protected by qualified privilege as the Chief Operating Officer and the Regional Manager of the Eastern Region of the first defendant has a corresponding interest to receive the letter*. This is fortified by the fact that the subsequent letter of termination of the plaintiff's dealership was signed by the Chief

Operating Officer of the first defendant. In respect of defamation I am therefore of the view that the plaintiff's claim against the defendant is frivolous, vexatious and an abuse of the process of the court. Further, I am in agreement with learned counsel for the defendant that the plaintiff had not set out any facts which form the basis of the alleged breach of contract. The defendant's appeal in encl 11 was therefore allowed with costs and the claim was consequently struck out.

[152] In the present case before us the impugned email was in the nature of an instruction or directive from D3 to its panel solicitors to be on the look-out for any attempt by the plaintiff (*who has a propensity to serve cause papers directly on the insured/drivers and without notifying the insurer*) to proceed with assessment of damages. The plaintiff's previous conduct (*to wit the Georgetown Suit*) puts D3 in peril of having to pay judgment sums which are assessed without the participation of D3's lawyers. It is important to keep in mind that the plaintiff 'stuck to his guns' so to speak and said that he is entitled to serve the cause papers on the insured/driver which also means that he is not obliged to serve the same on the insurer (D3).

[153] Hence, it is not just reasonable but quite necessary for D3 to take pro-active steps to avert any repeat of the Georgetown Suit. In this situation, D3's panel lawyers who appear in court are literally D3's 'eyes and ears' and if they see or hear that the plaintiff is going ahead with assessment of damages, then as per the impugned email they have to step in and do the needful to protect D3's pecuniary interest in the event the case involves D3's insured.

[154] To say that D1 had no duty to communicate the impugned email to the recipients particularly the panel lawyers (such as Anita, Lim and Zamri) and they had no reciprocal interest in being informed the plaintiff's propensity to assess damages without the presence of the insurer's lawyers is completely at odds with the evidence that was laid before the JC. For completeness, we would add that merely because the Kulim Suit was 'exploding' does not ipso facto mean that the impugned email was the product of malice or bad faith on the part of D1 who authored and circulated the same. Given the circumstances pertaining to how the plaintiff conducted himself vis a vis the Georgetown Suit, it cannot be said that the impugned email was in retaliation for the Kulim Suit. The two suits were quite different although they were both problematic for D1 and by extension, D3. The timing of the impugned email was just coincidental. It bears repeating that at or around the time when the impugned email was issued the Georgetown Suit was still a live issue in that D3 had succeeded in setting aside the JID and the default order and had just filed and served the cause papers for OS 557 on the plaintiff. In the circumstances, we fail to see how the JC could conclude that defence of qualified privilege fails.

[155] Next, the JC concluded that the defence of qualified privilege could

not be sustained because there were apparently other solicitors who had the plaintiff's propensity and yet it was only the plaintiff who was singled out for mention in the impugned email. At first blush, this seems to be a superficially attractive proposition. However, the conclusion that qualified privilege does not apply is not factually and legally sustainable.

[156] In this case, the plaintiff had already demonstrated himself to be someone who has the propensity to serve the cause papers directly on the insured and declined to serve them on the ultimate paymaster (D3) and had even ignored a stay order which was granted by the magistrate court in the Georgetown Suit and sought to demand payment despite being informed of the stay order. In those circumstances it is hardly surprising that the plaintiff was specifically mentioned in the impugned email.

[157] Thus, on the facts, there was clearly a duty on D1's part to issue and circulate the impugned email and a corresponding interest on the part of D3's claim examiners and the panel solicitors to be informed of this. The solicitors had to be apprised of the plaintiff's propensity to serve the cause papers on the insured and then obtain JID and assess damages without informing D3 so that they would protect D3's interest by implementing the directive per the impugned email. And, it was important for the claims examiners to be in the loop as the solicitors would be liaising with them and if a call is made from a panel solicitor who was in court, then, the claims examiner would have to approve on-the-spot, the said solicitor's appointment to act in the matter, which would be a circumvention (by necessity) of the fair and equitable appointment of solicitors on a rotation basis.

[158] Thus, if the JC had kept an open mind and apprised himself of the matters alluded to in the preceding parts of this judgment, then it is unlikely that he would have viewed the impugned email in such a sinister light as he did per his grounds of judgment. We also disagree with the JC's implicit or overt conclusion that there was any malice or improper motive on the part of D1 when she issued and circulated the impugned email.

[159] As we said earlier, OS 557 was afoot and had just been served on the plaintiff around the same time as the impugned email. Whilst it is true that the Kulim Suit episode was raging or exploding around the same time, we do not think that, other than proximity of timing, that it had anything to do with the impugned email as the content of the impugned email bore no causal link or any factual or legal connection with the Kulim Suit, which was a different problem altogether.

[160] In the result, we are impelled to the conclusion that the impugned email was issued/circulated because of what had transpired in the Georgetown

Suit and had no causal connection with the Kulim Suit.

[161] The words appearing in the impugned email are not defamatory of the plaintiff and are not capable of conveying the defamatory imputations as pleaded in the statement of claim and as elaborated in the plaintiff's witness statement.

[162] Alternatively, in the event the impugned email is defamatory, we hold that the words contained therein, 'the above lawyer is assessing claims without the defendant lawyer appointed …', are true in substance. Hence, the defence of justification (per s 8 of the Defamation Act 1959) succeeds.

[163] Yet, further, even if the defence of justification fails, the defendants are entitled to succeed based on the defence of qualified privilege as D1 in her capacity as the Senior Claims Manager, was under a duty to protect D3's commercial/legal interest by pro-actively taking risk management steps to avert or avoid the situation that occurred in the Georgetown Suit and there was a reciprocal interest on the part of the panel solicitors and D3's claims examiners in being informed of the plaintiff's tendency to go ahead with assessment of damages in the absence of solicitors who would ordinarily be appointed by D3.

[164] Based on the evidence, it is quite clear that the privilege was not lost due to any malice on D1's part. The onus was on the plaintiff to prove malice and not on the defendants to prove their bona fides or absence of malice (see: *Hoe Thean Sun & Anor v Lim Tee Keng* [1999] 3 MLJ 138 (HC) at p 142). In our view, the plaintiff had alleged but failed to prove that D1 was actuated by malice or improper motives. To put it in context, the plaintiff's theory is that the impugned email was issued by D1 in retaliation for the debacle that took place in the Kulim Suit and the erroneous declaratory order coupled with the plaintiff's threat to commence execution proceedings and winding-up proceedings. For our part, we do not think that D1's frustration and disdain for the plaintiff for his threat to commence execution and winding-up proceedings (based on the judgment in the Kulim Suit) gives rise to malice or that improper motives can ipso facto be inferred.

[165] Indeed, on the issue of malice or improper motives it is imperative that we remind ourselves of Lord Diplock's salutary words in *Horrocks v Lowe* [1975] AC 135 at p 150 (*particularly the words which have been highlighted*) where he said:

> Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but

love the sinner. *Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it.* It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that 'express malice' can properly be found.

[166] Looking at the evidence as a whole, any reasonable tribunal would have concluded that D1's sole and only reason for issuing the impugned email was to protect D3's interest by risk managing the situation and avoiding a recurrence of what had taken place in the Georgetown Suit.

OUTCOME

[167] Having considered the matter carefully, and having due regard to the comprehensive written submissions and the extensive oral clarification before us, for the reasons articulated in the earlier paragraphs, we find that the defendants' main criticisms of the JC's reasons for allowing the plaintiff's claim in defamation are well founded. In all the circumstances, we are satisfied that there was a lack of judicial appreciation of the evidence and a misunderstanding of the requisite legal principles.

[168] We are satisfied that the said decision of the JC was in all the circumstances, *plainly wrong* in the sense that no reasonable tribunal similarly circumstanced would have reached the conclusion that was arrived at by the JC. Hence, we are of the view that there are appealable errors warranting appellate interference.

[169] In the upshot, we find that the JC's approach was erroneous, the reasoning flawed and the conclusions wrong. *We therefore allow Appeal 2112 and set aside the decision/judgment of the High Court dated 27 October 2022*. Consequently, the *plaintiff's claim is dismissed*. It follows that *Appeal 2197* cannot stand and it is *dismissed with no order as to costs*.

[170] In any event, it is clear that the plaintiff's claim for RM4.8m being the purported loss of income was not proven as there was no credible evidence that Tokio Marine Insurance (M) Bhd stopped giving work to the plaintiff because of the impugned email. In any event, such a claim is too remote (see para [105] of the High Court's ground of judgment). As for *Appeal 2112*, we allow costs in favour of the appellants (defendants) in the sum of *RM80,000* (subject to allocatur) as costs here and below.

[171] We also make a consequential order that the High Court costs of RM52,000 (inclusive of allocator) be refunded forthwith by the respondent in Appeal 2112 to the appellants, through their solicitors. We also order that the judgment sum of RM371,424.66 (plus all interest accrued until the date of refund) which was paid to the respondent in Appeal 2112, (as per High Court order dated 24 November 2022 — encl 153) be refunded forthwith to the appellants in Appeal 2112 through their solicitor.

Appeal 2112 allowed; Appeal 2197 dismissed; High Court's decision set aside and Siva's claim dismissed.

Reported by Ashok Kumar